Supreme Court, U.S.
FILED

No. 94 869 OCT 2 4 1994

OFFICE OF THE CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1994

JOSEPH M. PERSINGER, on behalf of himself and all other shareholders of Persingers Incorporated, a West Virginia corporation,

Petitioner,

v.

R. FRANK CARMAZZI, SALES ONE, INC., SALES TWO, INC., JOHN C. MORTON, W. GUY WILES, JR., WILLIAM M. TANTLINGER, ESQ., PERSINGERS INCORPORATED, WILLIAM F. AGEE, and BANK ONE, HUNTINGTON, WEST VIRGINIA, N.A. (FORMERLY, THE FIRST HUNTINGTON NATIONAL BANK, N.A.),

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

William V. DePaulo, Esq.
DePAULO & MURPHY
1211 Connecticut Ave., N.W.
Suite 705
Washington, DC 20036
(202) 223-4606

Counsel for Petitioner

74 pp

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond,Virginia 23219 (804) 648-3664

QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Fourth Circuit (Court of Appeals), in its June 29, 1994 unpublished, one-paragraph, per curiam opinion, abdicate its judicial authority by adopting in toto, the opinion of the Supreme Court of West Virginia in response to a referral of state law questions,

(a) where there were overriding federal due process questions presented to the Court of Appeals, which were mature for decision and which were dispositive of the appeal then pending before it, and

(b) where the referral of "questions of law to be answered" effectively converted the West Virginia Supreme Court into a court of appeals with respect to findings of fact and conclusions of law previously adjudicated after trial by a U.S. District Court Judge, and adopted in a prior opinion of the U. S. Court of Appeals.

2. Does the "business purpose doctrine", struck down by the West Virginia Supreme Court, and held invalid by the Fourth Circuit's adoption, without qualification of the West Virginia Supreme Court's opinion, in conflict with the holdings of the Fifth and Eleventh Circuits, permit a majority stockholder to cause a merger transaction solely for the purpose of cashing out minority shareholders.

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED 5

OPINIONS BELOW 2

JURISDICTION 6

CONSTITUTIONAL AND STATUTORY PROVISIONS AND CORPORATION BYLAW INVOLVED 7

STATEMENT OF THE CASE 8

SUMMARY 8

HISTORY OF PERSINGERS INC. 1904-1986 9

1904 Founding of Company by Moses Persinger 9

1941 Opening of Heavy Equipment Branch 9

1946 Incorporation of Business . 10

1964 Meredith Persinger Becomes President 10

CARMAZZI IN CONTROL 1985-1986 11

Carmazzi Made President 11

Death of John A. Persinger . . . 11

Appointment of Executor Bank's V.P. to Board 18

Adoption of Corporate Opportunity Bylaw 18

Meredith Persinger Removed From Board 19

Carmazzi Hires Counsel of Persingers Inc. 20

Carmazzi Group Agrees to Purchase Estate Block 21

Financing Conditioned on Freeze Out 22
Repeal of Corporate Opportunity Bylaws 25
Selective Redemption of Shares . 28
Final Purchase of Estate Block . 30
Special Meeting to Consumate Merger 31

PROCEEDINGS BELOW 33

I. LITIGATION BELOW -- 1987 to 1990
The 1987 District Court Trial 36
The 1988 Rescission Order, Findings of "Unconscionable" Conduct And Stay 38
1990 -- Dismissal of Respondents Appeal 38
1990-91 Proceedings Before The Trial Judge 39

II. LITIGATION BELOW -- 1991 to 1994

1991 Transfer of Case And Successor Judge's Entry, sua sponte and Without Notice or Opportunity to be Heard of Order Vacating Trial Findings As "Premature" . . 41

1992 Successor Judge Enters Summary Judgment In Favor Of Respondents Despite Facts Proven At Trial and Adopted in Court of Appeals 42

1993 The Court of Appeals Certification Order To the West Virginia Supreme Court Based On 1987 Trial Court Findings of Fact 43

The 1994 Opinion Of The West Virginia Supreme Court Based on Facts In Conflict With Court of Appeals Statement of Facts 43

1994 In Unpublished, One Paragraph, Opinion, Court of Appeals Affirms Summary Judgment Based on W.Va. Supreme Court Opinion . . . 45

REASONS FOR GRANTING THE WRIT

I **IN VIEW OF THE FEDERAL CONSTITUTIONAL QUESTIONS PRESENTED BY THIS CASE, THE COURT OF APPEALS ABDICATED ITS DECISION MAKING RESPONSIBILITY BY ADOPTING, IN TOTO, THE FINDINGS OF THE WEST VIRGINIA SUPREME COURT** . . . 46

II **THE FOURTH CIRCUIT'S OPINION DISCARDING THE BUSINESS PURPOSE DOCTRINE CONFLICTS WITH THE DECISIONS OF THE FIFTH AND ELEVENTH CIRCUITS** 62

TABLE OF AUTHORITIES

Page(s)

Armstrong v. Manzo, 380 U.S. 545 (1965) 46, 62

Bailey v. Vaughan, 178 W.Va. 371, 377, 359 S.E.2d 599, 605 (W.Va. 1987) 61

Bi-Rite Enterprises, Inc. v. Bruce Miner Co., 757 F.2d 440, 443 n. 3 (1st Cir. 1985) 58

Bishop v. Wood, 426 U.S. 341 (1976) 51

Boyter v. Commissioner of Internal Revenue Service, 668 F.2d 1382, 1386 (4th Cir. 1981) 59, 62

Bryan v. Brock & Blevins Co., Inc., 490 F.2d 563 (5th Cir. 1974) 63

Chounis v. Laing, 125 W.Va. 275, 288-290, 23 S.E.2d 628, 636 (W.Va. 1942) 60

Flannery v. United States, 718 F.2d 108, 110 (4th Cir. 1983) 59, 62

Florida ex rel Sherin v. Exxon Corp., 526 F.2d 266, 276 (5th Cir. 1976) 58

Hopkins v. Bryant, 121 W.Va. 748, 751, 6 S.E.2d 246, 248 (W.Va. 1939) 60

Insurance Services of Beaufort, Incorporated v. The Aetna Casualty and Surety Company, 966 F.2d 847 (4th Cir. 1992) 50, 62

Lebold v. Inland Steel Co., 125 F.2d 309 (7th Cir. 1942)

63

Lehman Brothers v. Schein, 416 U.S. 386 (1974) 58

Lewis v. Clark, 911 F.2d 1558 (11th Cir. 1990) 63

Masinter v. Webco Co., 164 W.Va. 241, 251-252, 262 S.E.2d 433, 440 (1981) 60

Milliken v. Meyer, 311 U.S. 457 (1940) . . 46

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 46

Nodak Bancorporation v. Clarke, 998 F.2d 1416 (8th Cir. 1993) 63

Pepper v. Litton, 308 U.S. 295, 60 (1939) 62, 63, 64

Persinger v. Carmazzi, 441 S.E.2d 646 (W.Va. 1994) 45

Smith v. FCX, Inc., 744 F.2d 1378 (4th Cir. 1984) 58, 61

Thurmond et al. v. Paragon Colliery Co., 82 W.Va. 49, 53-54, 95 S.E. 816, 817-818 (W.Va. 1918) 60

Tidler v. Eli Lilly and Co., 851 F.2d 418, 426 (Fed. Cir. 1988) 58, 61

United States v. Diebold, Inc., 369 U.S. 654 (1962) 51

Valtrol v. General Connectors Corp., 884 F.2d 149 (4th Cir. 1989) 50, 62

Virginia v. American Booksellers Association, Inc., 484 U.S. 383 (1988) 58

Weinberger v. Hynson, Wescott & Dunning, Inc., 412 U.S. 609 (1973) 51, 57

Young v. Columbia Oil Co., 110 W.Va. 364, 370-371, 158 S.E. 678, 681 (W.Va. 1931) 60

Constitution and Statutes

15 U.S.C. § 78(a) 7

28 U.S.C. 1331 and 1332(a) 7

28 U.S.C. §1254(1) 6

U.S. Const., Amend. V. 48

Other Authorities

Rule 65(a)(2), F.R.C.P. 37

Rule 7, F.R.C.P. 43

Rule 59, F.R.C.P. 43

Rule 33, F.R.C.P. 17

Rule 53, F.R.C.P. 42

Rule 59, F.R.C.P 40

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JOSEPH M. PERSINGER, on behalf of himself and all other shareholders of Persingers Incorporated, a West Virginia corporation,

Petitioner,

v.

R. FRANK CARMAZZI, SALES ONE, INC., SALES TWO, INC., JOHN C. MORTON, W. GUY WILES, JR., WILLIAM M. TANTLINGER, ESQ., PERSINGERS INCORPORATED, WILLIAM F. AGEE, and BANK ONE, HUNTINGTON, WEST VIRGINIA, N.A. (FORMERLY, THE FIRST HUNTINGTON NATIONAL BANK, N.A.),

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Joseph M. Persinger, on behalf of himself and all other shareholders of Persingers Incorporated (PI), a West Virginia corporation, respectfully prays that a writ of certiorari issue to review the judgment of the

United States Court of Appeals For the Fourth Circuit ("Court of Appeals") entered in this proceeding on June 29, 1994, with respect to which petitioner's timely filed petition for rehearing and suggestion for rehearing en banc were denied on July 26, 1994.

OPINIONS BELOW

The unpublished, per curiam opinion of the Court of Appeals decided June 29, 1994 and its order denying petitioner's petition for rehearing and suggestion for rehearing en banc entered July 26, 1994 are set forth in the Appendix hereto ("App.") at pages 1-9.

The opinion of the Supreme Court of Appeals of West Virginia ("W.Va. Supreme Court") decided February 17, 1994, Persinger v. Carmazzi, is reported at 441 S.E.2d 646 (W.Va. 1994) and is at App. 10-54.

The order of certification of the Court of Appeals to the W.Va. Supreme Court entered on June 18, 1993 and the amended order of

certification entered August 16, 1994 are at App. 55-116.

The memorandum opinion and order of the United States District Court for the Southern District of West Virginia ("District Court") (Haden, Chief Judge) entered June 22, 1992 are at App. 117-141.

The order of the District Court (Haden, Chief Judge) entered June 1, 1992 is at App. 142.

The order of the District Court (Haden, Chief Judge) entered June 1, 1992 is at App. 143-236.

The order of the District Court (Haden, Chief Judge) entered March 25, 1992 is at App. 237.

The order of the District Court (Haden, Chief Judge) entered March 24, 1992, is at App. 238.

The order of the District Court (Haden, Chief Judge) entered February 26, 1992 is at App. 239-241.

The order of the District Court (Haden, Chief Judge) entered December 11, 1991 is at App. 242-245.

The order of the District Court (Knapp, Senior Judge) entered July 23, 1991 is at App. 246-247.

The order of the District Court (Knapp, Senior Judge) entered January 29, 1991 is at App. 248-251.

The order of the District Court (Knapp, Senior Judge) entered August 30, 1990 is at App. 252-254.

The published, per curiam opinion of the Court of Appeals decided August 3, 1990, SouthEast Bank, N.A. v. Carmazzi, 910 F.2d 115, is at App. 255-266.

The order of the District Court (Knapp, Senior Judge) entered July 7, 1989 is at App. 267-272.

The order of the District Court (Knapp, Senior Judge) entered June 12, 1989 is at App. 273-276.

The order of the District Court (Knapp, Senior Judge) entered May 18, 1989 is at App. 277-278.

The order of the District Court (Knapp, Senior Judge) entered March 1, 1989 is at App. 279-284.

The order and memorandum opinion of the District Court (Knapp, Senior Judge) entered December 29, 1988 and January 5, 1989 respectively are at App. 285-331.

The order of the Court of Appeals entered July 15, 1988 is at App. 332-333.

The order of the District Court (Knapp, Senior Judge) entered June 28, 1988 is at App. 334-335.

The order of the District Court (Knapp, Senior Judge) entered April 12, 1988 is at App. 336-341.

The order of the District Court (Knapp, Senior Judge) entered July 17, 1987 is at App. 342-343.

The order of the District Court (Knapp, Senior Judge) entered June 17, 1987 is at 344-345.

The order of the District Court (Knapp, Senior Judge) entered May 19, 1987 is at App. 346-350.

All citations in this petition will be to the opinions as reproduced in the Appendix hereto ("App.") at pages 1-350.

JURISDICTION

The judgment of the Court of Appeals was entered on June 29, 1994. The petitioner's timely filed petition for rehearing and suggestion for rehearing en banc were denied by order of the Court of Appeals on July 26, 1994. This petition is being filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Petitioner, plaintiff below, is a citizen of the State of New Jersey; respondents, defendants below, were at the time each citizens of West Virginia. The amount in controversy exclusive of interest and costs exceeds $10,000.00. The basis for jurisdiction in the United States District Court for the Southern District of West Virginia was diversity of citizenship, 28 U.S.C. 1331 and 1332(a), federal securities law questions under 15 U.S.C. 78(a), and pendent jurisdiction over petitioner's state law claims.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND CORPORATION BYLAW INVOLVED

The constitutional and statutory provisions and the corporation bylaws involved in the case are as follows:

(i) Constitution of the United States, Amendment V.

(ii) West Virginia Code of 1931, as amended July 1, 1974, Acts of the 61st W.Va. Legislature, Ch. 13, §31-1-1 et seq., Regular Session (1974)

Sec. 31-1-19. Notice of shareholders' or members' meetings.

Sec. 31-1-22. Vacancies in board of directors; et cetera.

Sec. 31-1-24. Place and notice of directors' meetings.

Sec. 31-1-34. Procedure for merger.

Sec. 31-1-36. Articles of merger or consolidation; et cetera.

Sec. 31-1-37. Effect of merger or consolidation; et cetera.

Sec. 31-1-83. Rights of corporation to acquire and dispose of its own shares.

Sec. 31-1-122. Right of shareholders to dissent.

Sec. 31-1-123. Rights of dissenting shareholders; et cetera.

(iii) Persingers Incorporated Bylaws (3/1/86) Section 5.4. Purchase of Stock.

The pertinent texts of these materials are set forth at App. 351-388.

STATEMENT OF THE CASE

Summary

This petition involves the tale of how a newly appointed President of a small, closely-

held corporation, aided and abetted by the officers, directors, goes from an employee owning less than 1% of the stock of the corporation to Chairman of the Board owning 100% of the stock in a few short months utilizing the phenomenon of a leveraged buy-out followed by a "squeeze out" merger whereby all of the other stockholders of the corporation are thrown out at a dictated price.

In the process, the President tampers with the bylaws of the corporation and utilizes the funds of the corporation to further his LBO plans, all the while concealing these acts from unsuspecting shareholders.

In short, this is a story about unadulterated greed, about how that greed overrides ethical constraints and, ultimately, about violation of the law.

HISTORY OF PERSINGERS INC. 1904-1986

1904 Founding of Company by Moses Persinger

In 1904, Moses Persinger, grandfather of petitioner Joseph M. Persinger, began the business of Persinger Supply Company in Williamson, West Virginia. The business was initially a supplier of hardware and later mining materials.

1941 Opening of Heavy Equipment Branch

In 1941 a branch of Pesinger Supply Company was opened in Charleston, West Virginia by Meredith Persinger, General Manager of the Charleston branch, as a seller of heavy equipment for the construction industry. and as a dealer for tractors. In 1942 the tractors of Persinger Supply Company were sent to Russia, and Meredith Persinger was sent to the United States Army.

1946 Incorporation of Business

Returning from the war, Meredith Persinger was appointed the General Manager of Persingers Inc., which had been incorporated by his older brother, Arthur, and others, and to which the assets of

the Charleston branch of Persinger Supply Company had been sold.

1964 Meredith Persinger Becomes President

In 1964 Meredith Persinger succeeded to the presidency of Persingers Inc. upon the death of Arthur Persinger. Arthur's son, John A. Persinger, was elected to the board, and his widow inherited Arthur's 48% block. John A. was president of his own machinine company in Huntington, West Virginia, and, while a conscientious director of Persingers Inc., was never active in the day-to-day business. Upon his mother's death in 1981, John A. inherited the 48% block of stock.

Between 1946 and 1985, Meredith Persinger took the corporation, which had been incorporated with a capital of $100,000, to a corporation with audited assets of $4.2 million, no long term liabilities, short term liabilities of $321,000, and shareholder equity of $3,900,000, of which retained earnings

constituted $2,700,000 and cash and marketable securities constituted $1,200,000.

Carmazzi and Executor in Control 1985-1986

1985 Carmazzi Made President

In March 1985 Meredith Persinger was made Chairman of the Board, and R. Frank Carmazzi was made President. In 1984 Carmazzi had bought 40 shares of stock at a price of $100 per share.

Death of John A. Persinger

One month later, John A. Persinger died, and his executor, The First Huntington National Bank, N.A. (now Bank One, Huntington, West Virginia, N.A.) came into control of the 48% block of stock.

This action arises out of the actions of Mr. Carmazzi, and the other respondents, following John A. Persinger's death culminating in a "cash-out" merger consummated on May 29, 1987.

Prior to the merger, as of December 31, 1986, Mr. Carmazzi had been one of 46 shareholders of Persingers Inc. He owned 40 (out of

11,570) shares of its common stock, representing less than 1%. The book value of his shares was approximately $14,000.00. Upon consummation of the merger, Mr. Carmazzi became the sole shareholder and owner of Persingers Inc. After taking into account debt of approximately $1,500,000.00 incurred to carry out the transaction, which became a liability of Persingers Inc. through the merger, its shareholders equity was approximately $1,100,000.00 at book value. (App. 321-322 paragraph ["¶"] 53). The merger has thus resulted not only in the elimination of all other shareholders but also in a personal gain for Mr. Carmazzi in excess of $1,000,000.00.

This merger was accomplished despite the existence (until repealed by respondents without notice at the Persingers Inc. 1987 annual shareholders' meeting on March 7, 1987 as an admitted part of Mr. Carmazzi's plan), of a bylaw of Persingers Inc. (sec. 5.4) which (i) prohibits any purchases of Persingers Inc.'s stock by an

officer or director unless the corporation shall first have the opportunity to make the purchase for its own treasury, (ii) provides that any officer or director who negotiates for the purchase of Persingers Inc. stock shall be deemed to be negotiating on behalf of the corporation, and (iii) provides further that any officer or director who purchases shares without complying with the bylaw conclusively deemed to have purchased such shares on behalf of Persingers Inc. (App. 383-388)

This merger was accomplished despite an undisclosed letter of intent agreement between all respondents (other than Tantlinger) dated January 9, 1987, for the purchase of a bloc of 5,592 shares of Persingers Inc. common stock (forty-eight (48%) percent of shares outstanding), owned by the estate of John A. Persinger (the "John Persinger estate bloc" or "estate bloc"). Under bylaw sec. 5.4, Persingers

Inc. had the right to purchase the estate bloc pursuant to this agreement.

This merger was accomplished despite a higher purchase offer made by petitioner on May 27, 1987, to purchase (i) the John Persinger estate bloc for $285.00 per share, and (ii) any or all shares of Persingers Inc. from any shareholder electing to sell for $300.00 per share.

Finally, this merger has been allowed to stand despite a December 29, 1988 Order and January 5, 1989 Memorandum Opinion (collectively, the "rescission order"), entered by a United States District Court judge after a 1987 consolidated bench trial on petitioner's counts for preliminary injunction and for permanent injunction or rescission of the merger. The rescission order held that (i) respondents Carmazzi, Morton and Wiles, had violated Persingers Inc. bylaw sec. 5.4 in connection with the merger by the January 9, 1987 agreement; (ii)

because the John Persinger estate bloc was purchased in violation of Persingers Inc. bylaw sec. 5.4, it was not lawfully held and could not lawfully be voted in favor of the merger, and accordingly the merger was not approved by the requisite majority vote; (iii) respondents Carmazzi, Morton, Wiles and Tantlinger had failed to properly protect Persingers Inc. minority shareholders when they failed to consider and act upon petitioner's offer or other alternatives to the merger; and (iv) that the effect of the merger was equivalent to a sale of the assets of Persingers Inc. to Mr. Carmazzi for inadequate consideration. Concluding that it would be "unconscionable" that the action taken by the stockholders and directors [the respondents] should be approved, the trial judge ordered that the merger be rescinded and held for naught. (App. 285-331)

In the rescission order, Senior United States District Court Judge Dennis R. Knapp (the

"trial judge") entered fifty-three (53) findings of fact and ten (10) conclusions of law. (App. 285-331) Pursuant to the page limits of Rule 33 of this Court, petitioner summarizes the facts as follows.[1]

Persingers Inc. was incorporated in 1946 and is engaged in the sale of mining and industrial machinery and supplies. As of December 31, 1986, it had audited assets of $4,240,000.00, current liabilities of $321,000.00, no long term liabilities, and shareholders equity of $3,919,000.00. Its retained earnings were $2,791,000.00, and its invested cash and marketable securities were $1,500,000.00. Included in its assets were real estate and buildings stated at their cost less accumulated depreciation. There were 11,570 shares of common

---

[1]Citations to the relevant volume and page numbers of the Joint Appendix filed with the Court of Appeals on September 1, 1992 are in the following form (V. __, A___). Citations to the relevant volume and page numbers of the Transcript of the 1987 consolidated trial held May 20, 1987 - June 15, 1987 are in the following form (Trial Tr. dtd. _____, pp. ____).

stock outstanding, with a book value of $338.00 per share. (V.4, A1122)

Petitioner, son of Meredith Persinger, and the brother of Thomas Persinger, was the owner of 76 shares of Persingers Inc. prior to the merger, but was neither an officer nor director. Prior to the merger, petitioner's family (sometimes referred to as the "Persinger group") owned 1,267 shares, or 10.9% of Persingers Inc.'s stock. Prior to his death on March 8, 1985, John A. Persinger, Meredith Persinger's nephew and petitioner's cousin, owned 5,592 shares (48% of Persingers Inc.'s stock), constituting the John Persinger estate bloc.

Respondents Carmazzi, Morton and Wiles owned a total of 786 shares or 7% of Persingers Inc. stock.

Appointment of Executor Bank's V.P. to Board

After John Persinger's death, The First Huntington National Bank, now Bank One, Huntington, W. Va. ("Bank One"), qualified as

executor of his estate. On September 17, 1985 at a special shareholders' meeting, respondent Agee was elected as a director of Persingers Inc. to fill the vacancy created by his death. (App. 289-290, ¶ 9)

1986 Adoption of Corporate Opportunity Bylaw

On February 10, 1986, Mr. Carmazzi gave notice to the Persingers Inc. shareholders that adoption of a new set of bylaws was to be considered at an annual meeting on March 1, 1986. Included in the new bylaws was sec. 5.4, restricting purchases of shares by directors and officers "as a protection for the shareholders." (V.4, A1013) At the meeting, these new bylaws were adopted. (App. 291)

Bylaw sec. 5.4 (the "bylaw") stated that it was the policy of Persingers Inc. to purchase any of its shares as may become available, subject to board approval of the terms. The bylaw (i) prohibited any purchases of the corporation's stock by an officer or director unless the

corporation first has the opportunity to make the purchase for its own treasury, (ii) provided that any officer or director who negotiated for the purchase of Persingers Inc. stock shall be deemed to be negotiating on behalf of the corporation, and (iii) provided further that any officer or director who purchased shares without complying with the bylaw was conclusively deemed to have purchased such shares on behalf of Persingers Inc. (App. 383-388)

Meredith Persinger Removed From Board

At the same meeting, respondents Carmazzi, Morton, Wiles and Agee voted to reduce the number of directors from six (6) to five (5), resulting in Meredith Persinger's elimination as a director. (V.4, A1015) At the 1987 trial, Mr. Morton admitted that this was done to reduce the representation of the Persinger family on the board. (Trial Tr. dtd. 6/15 /87, pp. 84-85)

On October 30, 1986, Agee, on behalf of Bank One, advised Meredith Persinger that Bank One

would sell him the estate bloc for $275.00 per share and that the offer was good for 21 days. Meredith Persinger countered with an offer to buy the estate bloc for $265.00 per share. (Trial Tr. dtd. 6/15/87, p. 124) At the trial, Mr. Persinger testified that if he had come to terms with Bank One, he intended to offer the estate bloc back to Persingers Inc. for purchase as treasury shares. (Trial Tr. dtd. 6/15/87, pp. 124-125)

Carmazzi Hires Counsel of Persingers Inc.

In November 1986, respondents Carmazzi, Morton and Wiles decided to buy the John Persinger estate bloc personally in order to control Persingers Inc. (App. V.4, A1021) They hired Charles B. Stacy, Esq., Charleston, West Virginia, and his law firm (the "Spilman firm") to represent them in this matter. (V.4, A1251-1261) At the same time, Mr. Stacy was also serving as counsel for Persingers Inc. (V.4, A1228-1250) Respondents Carmazzi, Morton and

Wiles met with Mr. Agee who said Bank One would sell the estate bloc to them for a price of $275.00 per share or a total price of $1,537,800.00. (V.3, A861; V.4, A1021)

In November and December, 1986, Mr. Stacy and these respondents developed a plan to acquire Persingers Inc. The Spilman firm reviewed the bylaw limitations on acquisition of company stock by officers and directors, drafted an outline of alternatives for stock purchase and drafted a letter of intent offer to Bank One. (V.4, A1251-1255)

Carmazzi Group Agrees to Purchase Estate Block

On January 9, 1987, Carmazzi, Morton and Wiles entered into a written letter of intent agreement with Bank One through Agee to purchase the estate bloc for $275.00 per share subject to obtaining adequate financing (the "January 9, 1987 agreement"). This agreement ran for a period of 60 days, or until March 10, 1987, during which time Bank One agreed that it would

not enter into any other agreements with regard to the shares.

Throughout this time period, Carmazzi and Morton were officers of Persingers and together with Miles constituted a majority of Persingers Inc.'s board of directors. Agee was also a director (V.3, A902). Additionally, Carmazzi, Wiles, Morton and Agee each were aware of the bylaw which restricted the sale of stock to officers or directors of Persingers Inc. (V.3, A861; V.4, A1251-1255). There was no disclosure of this agreement to Thomas Persinger, the other director, or to Persingers Inc.'s other shareholders. (V.4, A1303-1304)

Financing Conditioned on Freeze Out

In January 1987, Carmazzi, Morton and Wiles also met with officials of National Bank of Commerce, Charleston, West Virginia ("NBofC") to obtain a loan for the purchase. (V.3, A948; V.4, A1303, 1305) NBofC required (i) personal guarantees from Carmazzi, Morton and Wiles and

(ii) acquisition of all of the outstanding stock of Persingers Inc. so that they could place liens on the corporation's assets, as well as the estate bloc, for their loan. (V.1, A10-11; V.3, A973; V.3, A955-956) Wiles and Morton decided that they did not want to go forward with the purchase of the estate bloc, but Carmazzi did. (V.3, A973-974; V.4, A1033)

Carmazzi had to circumvent the prohibitions contained in the bylaw, which he had already violated by the January 9, 1987 agreement to purchase the John Persinger estate bloc. He had to elevate the estate bloc from a 48% bloc to an absolute majority control bloc of Persingers Inc. (51% or better) to assure passage of a "cash-out" merger to eliminate all other shareholders so that NBofC could obtain a lien for its purchase loan to Carmazzi on all of Persingers Inc.'s assets, not merely the stock itself. (V.4, A1034-1036)

A plan had been developed by the Spilman

firm. (V.4, A1251-1261) As Agee admitted at the 1987 trial, two parts of the plan were (i) the repeal of the bylaw and (ii) the selective redemption of certain Persingers Inc. shareholders to convert the estate bloc from a 48% bloc to a 51% (or more) absolute majority bloc. (V.3, A872)

Carmazzi, with the support of Agee who wanted to secure the $275.00 price to Bank One for the estate bloc, would have the bylaw repealed at the 1987 annual shareholders meeting. Then, at the directors meeting to be held thereafter, Carmazzi would have the board of directors elevate the estate bloc from 48% to 52% by redeeming stock from selected shareholders. (V.3, A872, 912-913)

Next, Carmazzi would purchase the estate bloc with a loan for 100% of its purchase price ($1,537,800.00) from NBofC. Finally, Carmazzi would use the estate bloc to vote a merger of his shell company into Persingers Inc. Carmazzi's

ownership of the estate bloc would guarantee that the merger would be approved on his terms. The merger agreement would provide that all shareholders, other than Carmazzi, would be "cashed-out," and Persingers Inc. would become liable for Carmazzi's loan from NBofC. (V.4, A1034-1035)

Repeal of Corporate Opportunity Bylaws

On March 2, 1987, Carmazzi met Mr. Stacy, still serving as counsel for both Carmazzi and Persingers Inc., and confirmed that he would repeal the bylaw at the 1987 annual shareholders meeting to be held on March 7, 1987. (V.3, A959) At the 1987 trial, Mr. Carmazzi admitted on cross-examination that (i) he had discussed repeal of the bylaw with Mr. Stacy on the Monday or Tuesday before the 1987 annual meeting and (ii) that Mr. Stacy knew about the January 9, 1987 agreement, but (iii) denied that Mr. Stacy had counseled him in the preparation of the January 9, 1987 agreement. (V.3, A959-960)

No notice of the repeal of the bylaw was given to the shareholders. On February 16, 1987, Carmazzi had disseminated a notice of the 1987 annual shareholders meeting to be held on March 7, 1987, and represented that the directors anticipated two matters would come before the meeting: (i) fixing the number of directors for 1987, and (ii) electing the directors to serve for the year. (V.3, A1017-1018)

On Wednesday, March 4, 1987, despite his conference with Mr. Carmazzi on March 2, 1987, Mr. Stacy told Thomas Persinger that the only matters he knew would occur at the meeting of shareholders were the fixing of the number of and electing of directors. (Trial Tr. dtd. 6/15/87, pp. 134-136)

At the 1987 annual meeting, Morton moved, seconded by Agee, that the bylaw be repealed. Thomas Persinger objected to the motion to repeal the bylaw because no notice of the proposed repeal of the bylaw had been given to the

shareholders. (App. 297-298, ¶21)

These objections were disregarded. Carmazzi, Morton, Wiles and Agee, on behalf of Bank One, voted 7,890 shares and proxies for repeal of the bylaw. Thomas Persinger voted 3,544 shares and proxies against repeal. The motion was declared to be carried and the bylaw repealed. Of the 7,890 shares voted for repeal, 5,592 shares were the shares held by the John Persinger estate. These shares were subject to the bylaw because of the undisclosed January 9, 1987 agreement, which ran to March 10, 1987. Excluding the estate bloc, 1,298 shares were voted for repeal, while 3,544 shares were voted against repeal. (App. 267-272, Exhibit C)

The shareholders of Persingers Inc. were not notified or otherwise advised of the fact that: (i) repeal of the bylaw was on the agenda for the annual meeting of shareholders held March 7, 1987, (ii) four of the five directors had already signed an agreement in direct violation of the

bylaw (iii) or that Carmazzi intended to purchase the estate block pursuant to that agreement in violation of the bylaw, and (iv) repeal of the bylaw was a component part of Carmazzi's plan to take over Persingers Inc. (V.3, A 867-868, 872)

Selective Redemption of Shares

After the repeal of the bylaw , Carmazzi turned to the remaining task of elevating the estate bloc from 48% to 52% at the annual directors meeting that immediately followed. (V.3, A872) Upon the motion of Wiles, seconded by Morton, respondents Carmazzi, Morton, Wiles and Agee voted as directors to redeem 832 shares of Persingers Inc. stock from several shareholders who three months earlier had expressed an interest in selling their shares. When certain of these shareholders had sought redemption of their shares three months earlier, on December 16, 1986, the board of directors refused to selectively redeem their shares, stating it would be unfair to other shareholders

to carry out a non-prorata or selective redemption of shares. (V.3, A912-913)

The redemption price was $220.00 per share; the total cost of the redemption was $183,000.00. This selective redemption of shares reduced the total number of issued and outstanding shares of Persingers Inc. from 11,570 to 10,738.(App 267-272, Exhibit C); (V.3, A867-868, 911) As a result, the 5,592 shares of the estate bloc were converted from a 48% bloc to a 52% bloc.

These two steps positioned Carmazzi to accomplish the final step of his plan -- the acquisition of 100% of Persingers Inc. through a "cash-out" merger in which all other shareholders of Persingers Inc. would be eliminated. Immediately following the directors meeting, Carmazzi and Agee signed a new letter of intent for the purchase of the John Persinger estate bloc, which ran for another 60 days. (V.4, A1033)

On March 13, 1987, Carmazzi provided NBofC

with a written version of the plan to acquire Persingers Inc. (V.4, A1034-1036) That document makes no mention of the repeal of the bylaw but does list the selective redemption and the elevation of the estate block as its first steps.

On March 20, 1987, Carmazzi sent a letter to shareholders to report on the 1987 annual meetings. He did not disclose (i) the January 9, 1987 agreement; (ii) the repeal of bylaw 5.4; (iii) the selective redemption, or (iv) the March 7, 1987 agreement. (V.4, A1019)

The plan went to recite the next steps to be taken in carrying out the plan culminating in a cash-out merger whereby all shareholders of Persingers Inc. would be "forced to sell" at a $220.00 price. (V.4, A1035-1036)

Final Purchase of Estate Block

Having carried out the steps in his plan, Carmazzi closed his loan with NBofC on April 17, 1987, and, through Sales One, purchased the 5,592 shares of the John Persinger estate bloc with

NBofC's loan for $1,537,800.00. Carmazzi granted NBofC a security interest in the estate bloc to temporarily secure the loan and agreed to grant liens on substantially all of Persingers Inc.'s assets once the cash-out merger was consummated. (V.3, A955-956) He also noticed a special directors' meeting of Persingers Inc. for April 27, 1987 to consider his proposed merger. This notice was the first disclosure of Mr. Carmazzi's plan to acquire Persingers Inc. On April 17, 1987, Agee, having accomplished his goal of selling the estate bloc for $275.00 per share, resigned as a director of Persingers Inc. (V.3, A868-869; V.4, A1215)

Special Meeting to Consumate Merger

On April 27, 1987, a special meeting was held to (i) select a new director to replace Agee and (ii) consider and vote on a plan of merger between Sales One, Sales Two and Persingers Inc. (App. 311-312, ¶¶ 35 & 36).

Between April 22, 1987 and April 27, 1987,

Carmazzi, Morton, Wiles and Tantlinger met privately with Mr. Stacy and other members of the Spilman firm to discuss the proposed merger. Thomas Persinger was not notified of or invited to these meetings, and did not attend. (App. 312, ¶ 37; V.4, A1242-1244)

At the special directors meeting on April 27, 1987, Tantlinger was elected as a director to fill the vacancy caused by the resignation of Agee. (App. 311-312 ¶36) After Tantlinger was seated, the meeting turned to consideration of the merger.

Thomas Persinger made several proposals at the directors meeting, including that (i) that an investment banker be hired to opine on the fairness of the merger; and (ii) that the minority shareholders be represented by an independent negotiating committee. These proposals was rejected by Morton, Wiles and Tantlinger. (App. 267-272, Exhibit C)

Morton, Wiles and Tantlinger voted to

recommend the proposed merger to the Persingers Inc. shareholders on the exact terms proposed by Carmazzi. There was no counter-offer by these directors to the merger terms proposed by Carmazzi. Furthermore, there was no attempt to determine if others besides Carmazzi might have an interest in acquiring Persingers Inc. Director Thomas Persinger voted against recommending the merger to the shareholders. (App. 267-272, Exhibit C)

With Carmazzi then in control of the estate bloc (52%), it was a foregone conclusion that the merger would be approved by the shareholders, and it was on May 29, 1987. The shareholder vote was tallied as 7,302 shares voted for and 3,328 shares voted against the merger. Without the John Persinger estate bloc, however, the shareholder vote was 1,710 shares for the merger and 3,328 shares against the merger. (App. 267-272, Exhibit C); (V.4 A1037-1038)

PROCEEDINGS BELOW

On May 7, 1987, petitioner filed this action for a preliminary and permanent injunction or rescission of the merger in the District Court. (V.1, A10) As a result of petitioner's discovery, the January 9, 1987 agreement was finally disclosed. (V.3, A867-868; V.4, A1024-1026)

On May 21, 1987, upon completion of petitioner's case in chief, Carmazzi made an attempt to comply with the bylaw; Carmazzi and Sales One offered to sell the estate bloc to Persingers Inc. for the price of $275.00 by a written offer. (V.4, A1029) A special meeting of the board of directors of Persingers Inc. was called for May 27, 1987 to consider Carmazzi's offer. (V.4, A1032)

On May 26, 1987, petitioner and 1866 Holdings, Inc. made a written offer to Persingers Inc. (i) to purchase from it the 5,592 shares of the estate bloc for a cash price of $285.00 per

share and (ii) to purchase from all other Persingers Inc. shareholders choosing to sell up to 100% of their Persingers Inc. shares for a cash tender purchase price of $300.00 per share, with no shareholder being required to sell any shares. (V.4, A1027-1028)

Upon receipt of petitioner's offer, Carmazzi amended his outstanding offer by adding conditions which purported to prohibit the resale of the estate bloc by Persingers Inc. to petitioner or any member of the Persinger family. (V.4, A1030-1031) At the 1987 trial, Carmazzi admitted that the amendment was intended to prevent consideration and acceptance of petitioner's offer. (V.1, A394; V.3, A961-962)

Carmazzi's amendment was not resisted by Wiles, Morton or Tantlinger. Instead, these directors did not even consider petitioner's offer. (App. 319, ¶ 48) Thus, the minority shareholders of Persingers Inc. were deprived of

the option to either (i) remain as shareholders or (ii) receive $300.00 per share for as many shares as they wished to sell (in contrast to Carmazzi's "cash-out" price of $222.00 per share).

On May 29, 1987, the trial judge denied petitioner's request for a preliminary injunction and the merger was consummated. The consolidated trial on permanent injunction was then treated as one for rescission of the consummated merger and was completed on June 15, 1987. (App. 285-286)

The 1987 District Court Consolidated Trial

On May 19, 1987, petitioner's counts for preliminary injunction and permanent injunction of the merger were advanced and consolidated for trial pursuant to Federal Rules of Civil Procedure ("FRCP"), Rule 65(a)(2), by order of the trial judge. (App. 346-350) Petitioner's counts for conspiracy, fraud and conversion were not set for trial. This order was stipulated to by counsel for petitioner and by counsel for all

respondents except William F. Agee and Bank One, who were not parties to the action at that time.

The trial judge conducted evidentiary hearings on May 20, 21, 28 and 29, 1987 and June 15, 1987. After conclusion of trial on June 15, 1987, the parties filed briefs and proposed findings of fact and conclusions of law. On October 20, 1987, the trial judge heard oral argument of counsel on rescission. Thereupon, the trial judge took this issue under advisement.

On April 12, 1988, the trial judge granted petitioner's motion to add Agee and Bank One as defendants, but denied the petitioner's previously filed motion to certify the action as a class action. (App. 336-341) After their addition as defendants, neither respondent Agee nor Bank One moved to modify the May 19, 1987 trial order, or to re-open the 1987 trial.

On December 20, 1988, the trial judge conducted a hearing on petitioner's motion to enjoin Carmazzi's attempt to terminate Persingers

Inc.'s over-funded employee pension plan. At the hearing, the trial judge stated to counsel for Bank One that he intended to rule soon on the pending issue of rescission. (Tr. dtd. 12/20/88, pp. 34-35)

The 1988 Rescission Order, Findings of "Unconscionable" Conduct And Stay

On December 29, 1988, the trial judge entered his order rescinding the merger in accordance with a memorandum opinion to be later filed, entered on January 5, 1989 (collectively, "rescission order"). The trial judge stated that the repeal of Persingers Inc. bylaw sec. 5.4 was "violative of ethical standards and prudent business practices and should not be condoned," and stated further that "(i)t is unconscionable that the action taken by the stockholders and directors [respondents] should be approved." (App. 329-330)

The trial judge stayed operation of the rescission order to allow an appeal. (App. 330-331) None of the respondents made a motion for a new trial or a motion to alter or amend a judgment pursuant to Rule 59, F.R.C.P; all respondents appealed to the Court of Appeals.

1990 -- Dismissal of Respondents Appeal

On August 6, 1990, in a published, per curiam opinion (the "1990 opinion"), the Court of Appeals dismissed and remanded respondents' appeal. SouthEast Bank, N.A.; Joseph M. Persinger v. R. Frank Carmazzi, et al. (App. 255-266).

The Court of Appeals drew an inference as to the acts of respondents, i.e., "an inference is drawn that the improper acts of appellants commenced as early as January 1987, when Carmazzi, Wiles and Morton reached an agreement for an option to purchase 5592 shares (48 percent of the Persinger stock) formerly owned by John A. Persinger, ..." (App. 262-264).

1990-91 Proceedings Before The Trial Judge

On August 30, 1990, the trial judge ordered all parties to file their proposed plans to implement rescission. (App. 252-254) Petitioner's plan of rescission provided that:

(i) The estate bloc be delivered to the Persingers Inc. treasury to be held as treasury shares as required by the bylaw;

(ii) Shareholders who had been cashed-out of Persingers Inc. could rejoin Persingers Inc. by repaying to it the $222.00 per share that they had received in cancellation of their shares; and

(iii) Shareholders who wished to remain outside of, or sell all or a part of their shares in Persingers Inc. would receive $300.00 per share for any or all shares which they wished to sell.

Petitioner requested a hearing on his plan of rescission and hearings were scheduled by the trial judge in November 1990 and January 1991. No hearings were actually held, however.

Instead, on January 29, 1991, the trial judge entered an order referring the action to William E. Hamb, Esq., Charleston, West Virginia,

as Special Master pursuant to Rule 53 of the F.R.C.P.

On February 11, 1991, petitioner moved the trial judge to withdraw or vacate the reference to the Special Master. The respondents filed memoranda in opposition to petitioner's motion to withdraw the reference.

On July 23, 1991, citing "reasons appearing to the court," the trial judge transferred the action to the Honorable Charles H. Haden, II, Chief Judge of the District Court (the "successor judge"). As of the date of this transfer, petitioner's plan of rescission had been pending before the District Court without a hearing for more than eight months (10/26/90 - 7/23/91).

1991 -- Transfer of Case And Successor Judge's Entry, sua sponte and Without Notice or Opportunity to be Heard of Order Vacating Trial Findings As "Premature"

On December 11, 1991, as his first act in the case, the successor judge entered an order which (i) denied petitioner's motion for attorney

fees, (ii) denied petitioner's motion to implement rescission, (iii) granted petitioner's motion to withdraw or vacate the order of reference to the special master, and (iv) vacated the rescission order entered by the trial judge. (App. 242-245) This order (the "vacating order") was entered by the trial judge sua sponte and without notice or opportunity to petitioner to be heard thereon.

The successor judge recited certain "complaints" by Agee and Bank One about the 1987 consolidated trial procedure, (App. 243-244), neither Agee nor Bank One had filed post trial motions for relief for their complaints as required by Rule 7 and Rule 59 F.R.C.P.

On December 26, 1991 and January 30, 1992, petitioner filed a motion and supporting memorandum which requested the successor judge (i) to reconsider and set aside that portion of the vacating order that had vacated the rescission order, and (ii) to grant petitioner notice and an

opportunity to be heard thereon.

The successor judge did not grant petitioner an opportunity to be heard. On March 24, 1992, he entered a one (1) page order which denied petitioner's motion and ordered that the vacating order would remain in full force and effect. (App. 238)

1992 -- Successor Judge Enters Summary Judgment In Favor Of Respondents Despite Facts Proven At Trial and Adopted in Court of Appeals

On June 22, 1992, the successor judge granted summary judgment to the respondents against all counts of petitioner's complaint (the "1992 summary judgment"), including petitioner's counts for conspiracy, fraud and conversion which had not been tried under the May 19, 1987 trial consolidation order. (App. 117-141) On July 9, 1992, petitioner filed a timely notice of appeal to the Court of Appeals.

1993 -- The Court of Appeals Certification Order To the West Virginia Supreme Court Based On 1987 Trial Court Findings of Fact

On June 18, 1993 and August 18, 1993, the

Court of Appeals certified four (4) questions of law to the West Virginia Supreme Court. The Court of Appeals did not address the federal due process issues raised by the vacating order. (App. 55-116)

The 1994 Opinion Of The West Virginia Supreme Court Based on Facts In Conflict With Court of Appeals Statement of Facts

On February 17, 1994, the West Virginia Supreme Court issued its unanimous written opinion, authored by Justice Richard M. Neely, which concluded that there was "no showing that the minority shareholders were treated unfairly, that the defendants [respondents] acted improperly with regard to the minority shareholders or that the defendants [respondents] gained any particular advantage as a result of an improper use of their fiduciary position. (App. 10-54)

In its opinion, the West Virginia Supreme Court did not discuss the January 9, 1987 letter of intent agreement. (App. 10-54) The court

interjected a "fact" not found by the trial judge and not certified by the Court of Appeals, i.e., "it appears that Mr. Carmazzi, through his personal guarantee backing up the NBofC loan was willing to accept financial exposure in order to restore morale and end the disruption and strife caused by the Persinger Group." (App. 50) The 1993 certification order of the Court of Appeals, however, contained no statement of fact as to any morale problem, disruption or strife caused by the Persinger group. (App. 55-116)

On March 21, 1994, petitioner filed with the Court of Appeals a motion for relief notwithstanding the opinion of the West Virginia Supreme Court of Appeals, and supporting memorandum. On March 25, 1994, respondents filed their joint response.

1994 -- In Unpublished, One Paragraph, Opinion, Court of Appeals Affirms Summary Judgment Based on W.Va. Supreme Court Opinion

On June 29, 1994, the Court of Appeals issued its unpublished, per curiam opinion (the

"1994 opinion") which affirmed the 1992 summary judgment entered by the successor judge. (App. 5-9) The Court of Appeals stated "(t)he West Virginia Court's answers, see Persinger v. Carmazzi, 441 S.E.2d 646 (W.Va. 1994), confirm the correctness of the district court's judgment, and, therefore, we affirm." (App. 9) The Court of Appeals did not discuss the federal due process issues arising out of the successor judge's vacating order. (App. 5-9)

On July 11, 1994, petitioner filed his petition for rehearing and suggestion for rehearing en banc with the Court of Appeals. They were denied on July 26, 1994.

REASONS FOR GRANTING THE WRIT

I

IN VIEW OF THE FEDERAL CONSTITUTIONAL QUESTIONS PRESENTED BY THIS CASE, THE COURT OF APPEALS ABDICATED ITS DECISION MAKING RESPONSIBILITY BY ADOPTING, IN TOTO, THE FINDINGS OF THE WEST VIRGINIA SUPREME COURT

A.
THE DISTRICT COURT'S VACATING OF THE TRIAL COURT'S FINDINGS OF FACT AND CONCUSIONS OF LAW AS "PREMATURE", WITHOUT NOTICE OR AN OPPORTUNITY TO BE HEARD, DENIED PETITIONERS DUE PROCESS

Notice and an opportunity to be heard are fundamental elements of the due process of law guaranteed every citizen and litigant by the Fifth Amendment. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). The notice must inform the interested parties of the pending judicial action and must give them an opportunity to present their objections. Milliken v. Meyer, 311 U.S. 457 (1940). The opportunity to be heard must be granted at a time and in a manner which are meaningful. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

The vacating order entered by the successor judge on December 11, 1991 as his first act in the case violated both tenets of due process. The order was entered sua sponte; neither Agee nor Bank One had filed a written motion as required by F.R.C.P. 7(b)(1) to request relief for these "complaints."

The vacating order was entered without notice of any kind to petitioner that the rescission order entered nearly three (3) years earlier after trial was to be vacated, or that petitioner's plan of rescission, pending without a hearing before the District Court for more than a year (10/26/90 - 12/11/91), would be denied.[2]

The vacating order was entered without affording petitioner a hearing on its plan. No

---

[2]Petitioner's motion to withdraw the reference to the special master entered on January 29, 1991, filed with the trial judge on February 11, 1991, obviously does not indicate "notice" of the vacating order, which would be entered by the successor judge ten (10) months later on December 11, 1991.

hearings thereon were actually held by either the trial judge or the successor judge.

Nor was petitioner given a hearing on the vacating order after its entry. Petitioner's motion and memorandum for reconsideration of the vacating order filed on December 17, 1991, and his supplemental memorandum filed on January 30, 1992, were denied by the successor judge without hearing on March 24, 1992. (App. 238).

The failure of the successor judge to give notice or grant a hearing has prejudiced petitioner. Petitioner had agreed to litigate his counts for preliminary injunction and for permanent injunction or rescission of the merger in a consolidated bench trial, pursuant to F.R.C.P. 65, more than four (4) years earlier. (App. 346-350). Based upon the trial evidence, the trial judge had granted petitioner his requested relief of rescission in 1988. (App. 285-331)

All respondents except Mr. Agee and Bank One

had agreed to the consolidated trial. (App. 346-350). After they were added as defendants in 1988, neither Agee nor Bank One moved to reopen the trial or to request a new trial, either before or after entry of the rescission order.

In its 1990 opinion, the Court of Appeals did not reverse the rescission order. The Court of Appeals did draw an inference that the "improper acts of the appellants [respondents] commenced as early as January 1987, ..." (App. 262-264) This was the January 9, 1987 letter of intent agreement.

Notwithstanding this direction by the Court of Appeals to the District Court to specify the method of rescission, petitioner was never given a hearing on his plan of rescission. It was denied without hearing by the successor judge. (App. 242-245)

Not only was this a per se denial of due process, but because petitioner was not given a hearing he could not make a record of his plan.

As a result, the "facts" certified by the Court of Appeals in 1993 to the W.Va. Supreme Court contained no reference to petitioner's plan of rescission. Having prevailed in the liability phase of the action from 1987-89, petitioner was literally cut off from completing the proof of his remedy, i.e., his plan of rescission, in 1990 and 1991.

The Court of Appeals has itself recognized that such treatment does not comport with due process, but inexplicably has not applied its own precedents to the actions of the successor judge. In Valtrol v. General Connectors Corp., 884 F.2d 149 (4th Cir. 1989), the Court of Appeals reversed the order of the district court judge who, sua sponte and without notice or opportunity to the prevailing plaintiff to be heard, had granted defendant a new trial on its counterclaim. 884 F.2d 149, 156. In Insurance Services of Beaufort, Incorporated v. The Aetna Casualty and Surety Company, 966 F.2d 847 (4th

Cir. 1992), the Court of Appeals held in a declaratory judgment action that the District Court's use of briefs alone to decide the issue of damages, without either a hearing or sufficient evidence in the record, was error of law. 966 F.2d 847, 853.

B.

THE FACTS PROVEN BY PETITIONER AT THE 1987 TRIAL UPON WHICH THE TRIAL JUDGE BASED HIS RESCISSION ORDER PRECLUDED ENTRY OF SUMMARY JUDGMENT FOR RESPONDENTS IN 1992

This Court has consistently stated that (i) summary judgment can be granted only if there is no genuine issue as to the material facts, Weinberger v. Hynson, Wescott & Dunning, Inc., 412 U.S. 609 (1973); and (ii) on such a motion the inferences to be drawn from the facts must be viewed in the light most favorable to the party opposing the motion. United States v. Diebold, Inc., 369 U.S. 654 (1962). In reviewing on certiorari a decision of a court of appeals affirming a district court's grant of summary

judgment against the plaintiff, this Court has held that it must accept the plaintiff's version of the facts because the district court was required to resolve all disputed facts in favor of the plaintiff. Bishop v. Wood, 426 U.S. 341 (1976).

In granting summary judgment to respondents in 1992 despite the facts proven by petitioner at the 1987 trial, the successor judge has clearly departed from the accepted use of summary judgment.

At the 1987 trial, petitioner proved a series of interrelated acts by respondents which the trial judge characterized as "violative of ethical standards" and which led him to conclude that "(i)t is unconscionable that the action taken by the stockholders and directors [respondents] should be approved." (App. 329-330). They included (i) the violation of Persinger's bylaw section 5.4 by the respondents' (Carmazzi, Morton, Wiles and Agee/Bank One) negotiation for

and execution of the January 9, 1987 letter of intent agreement for their personal purchase of the estate bloc; (ii) the nondisclosure of this agreement and the attendant right of Persingers Inc. to purchase the estate bloc during the term of the agreement, which ran for sixty (60) days from January 9, 1987 through March 10, 1987; (iii) the attempted repeal of the Persingers Inc. bylaw without notice before or after the fact and without disclosure of the agreement which violated Persingers Inc. bylaw sec. 5.4; (iv) the use of the estate bloc (at the time 48% of Persingers Inc. shares), which was itself subject to the bylaw because of the undisclosed January 9, 1987 letter of intent agreement, to vote the repeal of the bylaw without notice on March 7, 1987 at the annual stockholders' meeting; (v) the use of $183,000.00 of corporate funds to selectively redeem certain shareholders, after their redemption had been refused less than three months earlier as unfair to the other

shareholders, in order to convert the estate bloc to an absolute majority control (52%) bloc; (vi) Mr. Carmazzi's secret purchase of the John Persinger estate bloc in violation of the bylaw pursuant to a second undisclosed letter of intent agreement executed March 7, 1987; (vii) Mr. Carmazzi's attempt to block consideration of petitioner's more favorable purchase offer dated May 26, 1987, by Mr. Carmazzi's amendment dated May 27, 1987 to his prior undated sales offer, which amendment purported to restrict the resale of the estate bloc by Persingers Inc. to petitioner or any member of his family; (viii) the acquiescence of respondents Morton, Wiles and Tantlinger in Mr. Carmazzi's attempt to block petitioner's offer and their concerted failure to consider and act upon petitioner's higher offer; culminating in (ix) Mr. Carmazzi's use of the estate bloc to vote a "cash-out" merger of Persingers Inc. in which all other shareholders were eliminated and he gained more than

$1,000,000.00 of Persingers Inc. equity and its entire business as a going concern. (App. 285-331)

There was no genuine issue as to any of these facts; petitioner had proven each of them. At the 1987 trial, respondent Agee admitted on cross-examination that the repeal of the bylaw and the selective redemption were "part and parcel" of Mr. Carmazzi's plan to "buy" the company. (V.3, A872) At trial, Mr. Carmazzi himself admitted that his May 27, 1987 amendment to his undated sales offer previously made on May 21, 1987 was intended to block consideration of petitioner's higher purchase offer dated May 26, 1992. (V.3, A961-962)

Without hearing any testimony, the successor judge ignored these proven facts and drew inferences which were contradicted by the respondents' own admissions at the trial.

The clear conflict of the 1992 summary judgment with this Court's decisions in

Weinberger v. Hynson, Wescott & Dunning, Inc., supra, and United States v. Diebold, supra, has not been addressed by the Court of Appeals in its 1994 opinion. Nor does the W.Va. Supreme Court opinion "confirm the correctness" of the successor judge (App. 9), because, like the successor judge, the W.Va. Supreme Court ignored the proven facts and trial admissions.

The W.Va. Supreme Court omits any reference to the January 9, 1987 letter of intent agreement. The omission of this fundamental fact fatally flaws its opinion.

Accordingly, this Court should grant its writ of certiorari to supervise and correct the departure of the successor judge from this Court's settled decisions on the proper use of summary judgment. Weinberger v. Hynson, Wescott & Dunning, Inc., supra, and United States v. Diebold, supra.

C.

IN VIEW OF THE SETTLED BODY OF FEDERAL AND WEST VIRGINIA LAW PROHIBITING CORPORATE FIDUCIARIES FROM APPROPRIATING CORPORATE OPPORTUNITIES FOR THEIR PERSONAL BENEFIT, AS WELL AS THE FEDERAL CONSTITUTIONAL DUE PROCESS QUESTIONS UNANSWERED IN THIS ACTION, THE COURT OF APPEALS IMPROPERLY ABDICATED ITS DECISION MAKING RESPONSIBILITY BY CERTIFYING QUESTIONS TO THE WEST VIRGINIA SUPREME COURT

While certification is a useful procedure to determine unclear questions of state law, Lehman Brothers v. Schein, 416 U.S. 386 (1974); Virginia v. American Booksellers Association, Inc., 484 U.S. 383 (1988), other courts of appeals have recognized that certification is inappropriate where the applicable state law is clear. Florida ex rel Sherin v. Exxon Corp., 526 F.2d 266, 276 (5th Cir. 1976); Bi-Rite Enterprises, Inc. v. Bruce Miner Co., 757 F.2d 440, 443 n. 3 (1st Cir. 1985); Tidler v. Eli Lilly and Co., 851 F.2d 418, 426 (Fed. Cir. 1988).

In Smith v. FCX, Inc., 744 F.2d 1378 (4th Cir. 1984), the Court of Appeals declined to certify questions of state law, even when

requested by one of the parties, where there was "ample state precedent" on a question. 744 F.2d 1378, 1379. The Court of Appeals has held that "discretion ought not be exercised to certify a question of state law where a question of federal law is present and undecided, the decision of which may be wholly dispositive of the case." Boyter v. Commissioner of Internal Revenue Service, 668 F.2d 1382, 1386 (4th Cir. 1981). The Court of Appeals has even disregarded the answers of the W.Va. Supreme Court where it had certified questions "without appreciating at the time that federal questions lurked in the case," Flannery v. United States, 718 F.2d 108, 110 (4th Cir. 1983), reasoning that "(w)e should have first addressed the federal questions lurking in the case." 718 F.2d 108, 110.

The established body of federal and West Virginia law on the fiduciary duties of majority shareholders, officers and directors prohibits them from appropriating corporate opportunities,

such as Persingers Inc.'s right under its bylaw to purchase the estate bloc pursuant to the January 9, 1987 letter of intent, for their personal benefit. Pepper v. Litton, 308 U.S. 295 (1939); Young v. Columbia Oil Co., 110 W.Va. 364, 370-371, 158 S.E. 678, 681 (W.Va. 1931); Hopkins v. Bryant, 121 W.Va. 748, 751, 6 S.E.2d 246, 248 (W.Va. 1939); Chounis v. Laing, 125 W.Va. 275, 288-290, 23 S.E.2d 628, 636 (W.Va. 1942). Majority shareholders cannot vote their own interests where their actions are wholly outside of the interest of the corporation and destructive of the interests of the minority shareholders. Thurmond et al. v. Paragon Colliery Co., 82 W.Va. 49, 53-54, 95 S.E. 816, 817-818 (W.Va. 1918). They are required to act with the utmost fair dealing and good faith towards the other shareholders. Masinter v. Webco Co., 164 W.Va. 241, 251-252, 262 S.E.2d 433, 440 (1981). A corporate director who solicits a shareholder to purchase his stock and

fails to disclose information not known to the shareholder that bears upon the potential increase in value of the shares shall be liable to the shareholder either to have the sale rescinded or to respond in damages. Bailey v. Vaughan, 178 W.Va. 371, 377, 359 S.E.2d 599, 605 (W.Va. 1987).

In light of Pepper v. Litton, supra, and these W.Va. precedents, certification by the Court of Appeals here was inappropriate. Tidler v. Eli Lilly and Co., supra; Smith v. FCX, Inc., supra. Applied to the acts of respondents proven at the 1987 trial, see II supra, and particularly the undisclosed January 9, 1987 letter of intent agreement among respondents in violation of Persingers Inc. bylaw sec. 5.4 (App. 322, ¶ 1 and 2), Pepper v. Litton and these W.Va. precedents remove the need for certification by the Court of Appeals.

II

THE FOURTH CIRCUIT'S OPINION DISCARDING THE BUSINESS PURPOSE DOCTRINE CONFLICTS WITH THE DECISIONS OF THIS COURT AND THE FIFTH AND ELEVENTH CIRCUITS

In Pepper v. Litton, 308 U.S. 295 (1939), this Court stated that a corporate director or majority shareholder "cannot use his power for his personal advantage and to the detriment of the stockholders and creditors no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements . . . Where there is a violation of these principles, equity will undo the wrong or intervene to prevent its consummation." 308 U.S. 295, 311.

In reliance upon Pepper v. Litton, supra, other courts of appeal have struck down transactions in which controlling shareholders, ostensibly in full compliance with the applicable corporation codes, have used their power for personal gain. Lebold v. Inland Steel Co., 125

F.2d 309 (7th Cir. 1942); Bryan v. Brock & Blevins Co., Inc., 490 F.2d 563 (5th Cir. 1974); Lewis v. Clark, 911 F.2d 1558 (11th Cir. 1990); contra, Nodak Bancorporation v. Clarke, 998 F.2d 1416 (8th Cir. 1993).

The acts of the respondents in carrying out the "cash-out" merger of Persingers Inc., through which all of the shareholders were eliminated and Mr. Carmazzi became its sole owner at a substantial personal gain, have flaunted the Pepper v. Litton, 308 U.S. 295, 310-311. The transaction can not be legitimized by its purported compliance with the technical provisions of the West Virginia corporation code, for even before Pepper v. Litton this Court stated definitively that the trusteeship of majority shareholders does not rest upon "technical distinctions." Southern Pacific Co. v. Bogert, 250 U.S. 482, 492 (1918).

The acts of the respondents proven at the 1987 trial, II supra, constitute a case study in

how to violate as many precepts of Pepper v. Litton, supra, as possible in a single transaction. Through the "cash-out" merger and its enabling steps, Mr. Carmazzi eliminated all other shareholders, and gained more than $1,000,000 of Persingers Inc. equity. (App. 331-322, ¶ 53)

CONCLUSION

A writ of certiorari should issue to review the judgment below.

Respectfully submitted,

William V. DePaulo
DePaulo & Murphy
1211 Connecticut Ave., N. W.
Suite 705
Washington, D. C. 20036
202-223-4606

(2)

FILED

No. 94 869

OCT 24 1994

OFFICE OF THE CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1994

JOSEPH M. PERSINGER, on behalf of himself and all other shareholders of Persingers Incorporated, a West Virginia corporation,

Petitioner,

v.

R. FRANK CARMAZZI, SALES ONE, INC., SALES TWO, INC., JOHN C. MORTON, W. GUY WILES, JR., WILLIAM M. TANTLINGER, ESQ., PERSINGERS INCORPORATED, WILLIAM F. AGEE, and BANK ONE, HUNTINGTON, WEST VIRGINIA, N.A. (FORMERLY, THE FIRST HUNTINGTON NATIONAL BANK, N.A.),

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

William V. DePaulo, Esq.
DePAULO & MURPHY
1211 Connecticut Ave., N.W.
Suite 705
Washington, DC 20036
(202) 223-4606

Counsel for Petitioner

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

393 pp

APPENDIX
TABLE OF CONTENTS

Page

I. **Opinions and Orders by the Court of Appeals Whose Decision Is Sought to Be Reviewed:**

The unpublished, per curiam opinion of the United States Court of Appeals for the Fourth Circuit (the "Court of Appeals") decided June 29, 1994 and its order denying petitioner's petition for rehearing and suggestion for rehearing en banc entered July 26, 1994 1

II. **Other Opinions and Orders Rendered in the Case By the Courts Below:**

The opinion of the Supreme Court of Appeals of West Virginia ("W. Va. Supreme Court") decided February 17, 1994, Persinger v. Carmazzi, 441 S.E.2d 646 (W. Va. 1994) . . 10

The order of certification of the Court of Appeals to the W. Va. Supreme Court entered on June 18, 1993 and the amended order of certification entered August 16, 1994 55

The memorandum opinion and orders of the United States District Court for the Southern District of West Virginia ("District Court") (Haden, Chief Judge) entered June 22, 1992 117

The order of the District Court (Haden, Chief Judge) entered June 1, 1992 142

The order of the District Court (Haden, Chief Judge) entered June 1, 1992 143

The order of the District Court (Haden, chief Judge) entered March 25, 1992 237

The order of the District Court (Haden, Chief Judge) entered March 24, 1992) 238

The order of the District Court (Haden, Chief Judge) entered February 26, 1992 239

The order of the District Court (Haden, Chief Judge) entered December 11, 1991 242

The order of the District Court (Knapp, Senior Judge) entered July 23, 1991 246

The order of the District Court (Knapp, Senior Judge) entered January 29, 1991 248

The order of the District Court (Knapp, Senior Judge) entered August 30, 1990 252

The published, per curiam opinion of the Court of Appeals decided August 3, 1990, SouthEast Bank, N.A. v. Carmazzi, 910 F.2d 115 255

The order of the District Court (Knapp, Senior Judge) entered July 7, 1989 267

The order of the District Court (Knapp, Senior Judge) entered June 12, 1989 273

The order of the District Court (Knapp, Senior Judge) entered May 18, 1989 277

The order of the District Court (Knapp, Senior Judge) entered March 1, 1989 279

The order and memorandum opinion of the District Court (Knapp, Senior Judge) entered December 29, 1988 and January 5, 1989 respectively 285

The order of the Court of Appeals entered July 15, 1988 332

The order of the District Court (Knapp, Senior Judge) entered June 28, 1988 334

The order of the District Court (Knapp, Senior Judge) entered April 12, 1988 336

The order of the District Court (Knapp, Senior Judge) entered July 17, 1987 342

The order of the District Court (Knapp, Senior Judge) entered June 17, 1987 344

The order of the District Court (Knapp, Senior Judge) entered May 19, 1987 346

III. Constitutional and Statutory Provisions and Corporation Bylaws Involved:

Constitution of the United States, Amendment V 351

West Virginia Code of 1931, as amended July 1, 1974 Sections 31-1-19, 31-1-22, 31-1-24, 31-1-34, 31-1-36, 31-1-37, 31-1-83, 31-1-122, 31-1-123 352

Persingers Incorporated Bylaws (3/1/86) Section 5.4 383

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
July 26, 1994

No. 92-1832
CA-87-462-2

JOSEPH M. PERSINGER, on behalf of themselves and all other shareholders of Persingers, Incorporated, a West Virginia corporation; KENNETH T. WILLIAMSON; CAROL PRESTON WILLIAMSON

Plaintiffs-Appellants

v.

R. FRANK CARMAZZI; SALES ONE, INC., a West Virginia corporation; SALES TWO, INC., a West Virginia corporation; JOHN C. MORTON; W. GUY WILES, JR.; WILLIAM A. TANTLINGER; PERSINGERS INCORPORATED, a West Virginia corporation; WILLIAM F. AGEE; FIRST HUNTINGTON NATIONAL BANK, N.A.

Defendants-Appellees

No. 92-1833
CA-89-410-2

MEREDITH T. PERSINGER; M. THOMAS PERSINGER, Executors of the Estate of Helen P. Reams, deceased; MARY BOLAND PERSINGER; JOHN POWERS PERSINGER; KATHLEEN S. PERSINGER

Plaintiffs-Appellants

v.

R. FRANK CARMAZZI; SALES ONE, INC., a West Virginia corporation; SALES TWO, INC., a West Virginia corporation; JOHN C. MORTON; W. GUY WILES, JR.; WILLIAM A. TANTLINGER; PERSINGERS INCORPORATED, a West Virginia corporation; WILLIAM F. AGEE; FIRST HUNTINGTON NATIONAL BANK, N.A.

Defendants-Appellees

No. 92-1834
CA-89-411-2

MARGARET R. MCCARTNEY; ELIZABETH P. CHADEK; MARY FRANCES PERSINGER

Plaintiffs-Appellants

v.

R. FRANK CARMAZZI; SALES ONE, INCORPORATED, a West Virginia corporation; SALES TWO, INCORPORATED, a West Virginia corporation; JOHN C. MORTON;

W. GUY WILES, JR.; WILLIAM A. TANTLINGER; PERSINGERS INCORPORATED, a West Virginia corporation; WILLIAM F. AGEE; FIRST HUNTINGTON NATIONAL BANK, N.A.

Defendants-Appellees

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOSEPH M. PERSINGER, on behalf of themselves and all other shareholders of Persingers Incorporated, a West Virginia corporation; KENNETH T. WILLIAMSON; CAROL PRESTON WILLIAMSON,

Plaintiffs-Appellants,

v. No.92-1832

R. FRANK CARMAZZI; SALES ONE, INC., a West Virginia corporation; SALES TWO, INC., a West Virginia corporation; JOHN C. MORTON; W. GUY WILES, JR.; WILLIAM A. TANTLINGER; PERSINGERS, INCORPORATED, a West Virginia corporation; WILLIAM F. AGEE; FIRST HUNTINGTON NATIONAL BANK, N.A.,

Defendants-Appellees

MEREDITH T. PERSINGER; M. THOMAS PERSINGER, Executors of the Estate of Helen P. Reams, deceased; MARY BOLAND PERSINGER; JOHN POWERS PERSINGER; KATHLEEN S. PERSINGER,
Plaintiffs-Appellants,

v. No. 92-1833

R. FRANK CARMAZZI; SALES ONE, INCORPORATED, a West Virginia corporation; SALES TWO, INCORPORATED, a West Virginia corporation; JOHN C. MORTON; W. GUY WILES, JR.; WILLIAM A. TANTLINGER; PERSINGERS, INCORPORATED, a West Virginia corporation; WILLIAM F. AGEE; FIRST HUNTINGTON NATIONAL BANK, N.A.,
Defendants-Appellees

MARGARET R. McCARTNEY; ELIZABETH P. CHADEK; MARY FRANCES PERSINGER,
Plaintiffs-Appellants,

v. No. 92-1834

R. FRANK CARMAZZI; SALES ONE, INCORPORATED, a West Virginia corporation; SALES TWO, INCORPORATED, a West Virginia corporation; JOHN C. MORTON; W. GUY WILES, JR.; WILLIAM A. TANTLINGER; PERSINGERS, INCORPORATED, a West Virginia corporation; WILLIAM F. AGEE; FIRST HUNTINGTON NATIONAL BANK, N.A.,
Defendants-Appellees

Appeals from the United States District Court for the Southern District of West Virginia, at Charleston.
Charles H. Haden II, Chief District Judge.
(CA-87-462-2, CA-89-410-2, CA-89-411-2)

Argued: February 2, 1993

Decided: June 29, 1994

Before RUSSELL, HALL, and MURNAGHAN, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Edmond Daniel Johnson, MORRIS, NICHOLS, ARSHT & TUNNELL, Wilmington, Delaware, for Appellants. Cheryl Lynne Connelly, CAMPBELL, WOODS, BAGLEY, EMERSON, MCNEER & HERNDON, Huntington, West Virginia for Appellees. ON BRIEF: David G. Thunhorst, MORRIS, NICHOLS, ARSHT & TUNNELL, Wilmington, Delaware; John E. Lutz, J. W. Riccardi, DODSON, RICCARDI & LUTZ, Charleston, West Virginia, for Appellants. E. M. Kowal, Jr., CAMPBELL, WOODS, BAGLEY, EMERSON, MCNEER & HERNDON, Huntington, West Virginia; William C. Beatty, Daniel J. Konrad, HUDDLESTON, BOLEN, BEATTY, PORTER & COPEN, Huntington, West Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6

OPINION

PER CURIAM:

Certain shareholders of Persingers, Inc., a West Virginia corporation, brought suit against R. Frank Carmazzi and others to halt the buyout of minority shareholders and the merger of Persingers

with a corporation controlled by Carmazzi. The district court granted summary judgment for the defendants. The plaintiffs appealed, and we certified questions of law to the West Virginia Supreme Court of Appeals. The West Virginia court's answers, *see Persinger v. Carmazzi*, 441 S.E.2d 646 (W.Va. 1994), confirm the correctness of the district court's judgment, and, therefore, we affirm.

AFFIRMED

App. 10

IN THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA

January 1994 Term

No. 21804

JOSEPH M. PERSINGER, on behalf
of himself and other shareholders
of Persingers, Incorporated,
a West Virginia Corporation;
KENNETH T. WILLIAMSON; CAROL
PRESTON WILLIAMSON,
Plaintiffs-Appellants,

v.

R. FRANK CARMAZZI, SALES ONE, INC.,
a West Virginia corporation;
SALES TWO, INC., a West Virginia
corporation; JOHN C. MORTON; W. GUY
WILES, JR.;WILLIAM A. TANTLINGER;
PERSINGERS INCORPORATED, a West
Virginia corporation; WILLIAM F. AGEE;
FIRST HUNTINGTON NATIONAL BANK, N.A.,
Defendants-Appellees

Certified Questions from the
United States
Court of Appeals for the Fourth Circuit
Honorable Kenneth K. Hall, Judge
Civil Action No. 92-1832(L)

CERTIFIED QUESTIONS ANSWERED

Submitted: 19 January 1994
Filed: 17 February 1994

G. Nicholas Casey, Jr., Esq.
Paul M. Friedberg
Lewis, Friedberg, Glasser,
Casey & Rollins
Charleston, West Virginia
Attorneys for the Plaintiffs-Appellants

Edward M. Kowal, Esq.
Cheryl Lynne Connelly, Esq.
Campbell, Woods, Bagley, Emerson,
McNeer & Herndon
Huntington, West Virginia
Attorneys for Defendants-Appellants
R. Frank Carmazzi, Sales One, Inc.,
Sales Two, Inc., John C. Morton,
W. Guy Wiles, Jr., William A.
Tantlinger, Persingers Incorporated,
and William F. Agee

William C. Beatty, Esq.
Daniel J. Konrad, Esq.
Huddleston, Bolen, Beatty, Porter & Copen
Huntington, West Virginia
Attorneys for Defendant-Appellee
First Huntington National Bank

JUSTICE NEELY delivered the Opinion of the Court.

SYLLABUS

1. Under the West Virginia Corporation Act, W. Va. Code 31-1-19 [1975], shareholders are entitled only to receive notice of the place, day and hour of the annual meeting. Nowhere does the West Virginia Corporation Act provide that prior notice of a proposed bylaw amendment is required before it may be considered at an annual meeting. Notice need be given only when shareholders will be required to vote on an amendment to the articles of incorporation, merger, sale of assets, or dissolution.

2. A shareholder has a legal right, at a meeting of the shareholders, to vote upon a measure even though he has a personal interest therein separate from other shareholders. In such a meeting, each shareholder represents himself and

his interests solely and in no sense acts as a trustee or representative of others.

3. A corporation's redemption of its own stock does not constitute a breach of fiduciary duty unless the redemption plan has been shown to be illegal, ultra vires or fraudulent, or majority stockholders used their voting power for some self-serving purpose adverse to the interests of the corporation and its minority stockholders in voting for the redemption.

4. When a majority stockholder or majority stockholders seek to effect a corporation's merger, they may do so for any purpose whatsoever, so long as the terms tendered to the minority stockholders accurately reflect the fair market value of the minority interest.

Neely, J.:

This matter is before this Court pursuant to W. Va. Code 51-1A-1 et seq. [1976][1] on an order of certification from the United States Court of Appeals for the Fourth Circuit. We would point out initially that we are not sitting as an appellate court. Rather, pursuant to

---

[1] W. Va. Code 51-1A-1 [1976] provides:

> The supreme court of appeals of West Virginia may answer questions of law certified to it by the Supreme Court of the United States, a court of appeals of the United States, a United States district court or the highest appellate court or the intermediate appellate court of any other state, when requested by the certifying court if there are involved in any proceeding before it questions of law of this State which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court of appeals of this state.

W. Va. Code 51-1A-1 [1976] our job is simply to answer the questions of law posed by the Fourth Circuit. Thus, we assume the findings of fact given us in the Fourth Circuit Certification Order are correct. See Mustafis v. Erie Insurance Exchange, 174 W. Va. 660, 328 S.E.2d 675 (1985).

The findings of fact certified by the Fourth Circuit, in summary, are as follows: The plaintiffs in this action, self-named the "Meredith Persinger Group," (the Persinger Group) held approximately 16% of the stock of Persingers Incorporated (PI), a West Virginia corporation engaged in selling mine and mill supplies in southern West Virginia.

At the annual shareholders' meeting on 2 March 1985, plaintiff Meredith

Persinger was removed and defendant Frank Carmazzi installed as president and CEO of PI. In addition, the shareholders elected six directors: Meredith, Thomas and John A. Persinger, and defendants R. Frank Carmazzi, W. Guy Wiles, Jr. and John C. Morton.

Six days after the shareholders' meeting, John A. Persinger, son of PI's founder and nephew of Meredith Persinger, died. John A. Persinger was the controlling shareholder of PI, holding approximately 48% of PI's stock. The First Huntington National Bank (First Huntington) was named executor of his estate. As executor, First Huntington, acting through William Agee, Vice President and Trust Officer of First Huntington, controlled the 48% interest in PI.

Thereafter, Meredith Persinger and Thomas Persinger continued as directors of PI, but refused to attend board meetings. In addition, members of the Persinger Group attempted unsuccessfully to secure an agreement with First Huntington whereby they would be entitled to three members of a seven-member board and Meredith Persinger would be appointed chairman and CEO. On a 17 September 1985 special shareholders' meeting, Mr. Agee was elected as a director of PI to fill the vacancy resulting from John A. Persinger's death.

At the 1 March 1986 annual meeting, the shareholders approved a revision in section 5.4 of the corporation's bylaws that allowed the corporation to purchase for corporate purposes any shares of the capital stock of the corporation

available for purchase and giving the corporation priority over any other shareholders to make such purchases.

On 20 November 1986, acting on the request of certain shareholders that their stock be redeemed, PI's directors authorized redemption of 40 shares of the stock owned by one of these shareholders at a price of $220 per share. By letter dated 13 December 1986, Howard M. Persinger, on behalf of himself and fellow shareholders Sylvia P. Lentz, Sara P. Altizer, and Anna S. Athey, indicated he had been informed that the Board of PI had offered to purchase the shares of the Persinger Group and that the Persinger Group had until 15 December 1986 to accept or reject this offer. Mr. Persinger stated that he and the other shareholders mentioned in his letter

wished to continue to own their PI shares if the Persinger Group accepted PI's offer to buy their share; if, however, the Persinger Group rejected the offer and remained in the corporation, those shareholders requested the Board to offer to purchase their shares. None of the shares of the Persinger Group was offered to PI pursuant to its 15 December 1986 offer.

On 16 February 1987, notice was sent to the shareholders of PI that their annual meeting would be held on 7 March 1987. This notice did not state that the shareholders would be asked to vote on the repeal of section 5.4 of the bylaws, Mr. Carmazzi having determined after the notice was mailed that the repeal would be considered.

At the 7 March 1987 annual shareholders' meeting, a total of 69% of the shares voted in favor of repeal of section 5.4. At the annual Board of Directors' meeting held on the same day, the directors voted to redeem all of the shares offered for redemption at a price of $220 per share,[2] boosting the percentage of outstanding stock owned by the Persinger Group from 16.12% to 17.43% and the percentage of outstanding shares owned by First Huntington from 48% to 52% absolute majority position.

Also on 7 March 1987, First Huntington agreed to grant Mr. Carmazzi the right to purchase First Huntington's

---

[2] On 30 April 1986, at the request of Mr. Carmazzi and for general corporate purposes, Coopers & Lybrand, independent certified accountants, had appraised the fair market value of a minority interest of PI common stock to be $220 per share.

shares of PI at a price of $275 per share, subject to Mr. Carmazzi's ability to obtain financing. First Huntington agreed not to sell or agree to sell its shares to any other person for 45 days so that Mr. Carmazzi would have adequate time to pursue financing for the transaction. These negotiations were not disclosed to Thomas Persinger or to the shareholders before or during the directors' and shareholders' meetings on 7 March 1987.

In mid-March 1987, Mr. Carmazzi caused the formation of Sales One, a West Virginia corporation with its principal officers in Charleston, West Virginia. Mr. Carmazzi contributed to Sales One the 40 shares of PI stock owned by him as well as $1,000 and received in exchange all outstanding stock of Sales One. In

early April 1987, Sales One caused Sales Two, a West Virginia corporation with its principal place of business in Charleston, West Virginia, to be formed as a wholly-owned subsidiary of Sales One.

On 13 March 1987, Mr. Carmazzi submitted a financing plan to the National Bank of Commerce (NBofC), in response to NBofC's requirement that 100% of PI stock be purchased if it were to make a loan to Mr. Carmazzi to finance the buyout of PI. The plan provided for the purchase of the remaining outstanding shares of PI by means of merger. On 17 April 1987, Mr. Carmazzi and NBofC executed a loan agreement whereby NBofC agreed to lend Mr. Carmazzi $1,800,000. To secure the loan, NBofC required Mr. Carmazzi's personal guarantee and pledge

of all stock of Sales One, Sales Two and the PI stock owned by Sales One as well as a first lien security interest in substantially all of the assets of PI upon the merger of Sales Two and PI.

On 17 April 1987, Sales One and Sales Two jointly borrowed $1,537,800 from NBofC. From these proceeds, Sales One acquired all of First Huntington's PI shares of 52.45% of issued and outstanding PI stock at a price of $220 per share. Thereafter, Mr. Carmazzi, through Sales One and Sales Two, proposed to PI a merger agreement under which (i) Sales Two would be merged into PI, with PI as the surviving corporation; and (ii) each of the common shares of PI outstanding before consummation, other than the stock of PI owned by Sales One, would be converted into the right to

receive $222 in cash. This figure arose as a result of a Coopers & Lybrand appraisal of PI stock as of 28 February 1987.

On 18 April 1987, notice was mailed to all PI directors that a meeting would be held on 27 April 1987 to consider the Sales One and Sales Two offer. At the 27 April 1987 directors' meeting, a majority of PI directors, with Mr. Carmazzi abstaining and Thomas Persinger dissenting, voted to approve the merger agreement and submit it to the PI shareholders. Also at that meeting, Mr. Agee resigned as a PI director, with defendant William A. Tantlinger, a friend of Mr. Carmazzi, elected to succeed Mr. Agee.

On 28 April 1987, notice was mailed to all PI shareholders that a

shareholders' meeting would be held on 19 May 1987 for the purpose of considering and acting upon the merger of PI and Sales Two. Included in the notice was a statement describing dissenting shareholders' rights to appraisal and the appraisal reports.

By a 5 May 1987 letter to Mr. Carmazzi, Southeast Bank (Southeast), trustee of a deceased PI shareholder holding 5.92% of the corporation's outstanding stock, indicated that he estimated the cash offer to be low and requested the meeting with Mr. Carmazzi to discuss receiving a higher value for his shares. On 11 May 1987, Southeast and Joseph M. Persinger instituted the present action on behalf of themselves and all other shareholders against the defendants named in this action. In

their complaint, the plaintiffs sought to enjoin the merger of Sales Two into PI and claimed damages against the directors. The district court refused to issue a temporary restraining order on the merger.

On 21 May 1987, Sales One offered to sell its 5,592 PI shares acquired from First Huntington to PI for a price of $275 per share. A directors' meeting was called for 27 May 1987 to consider the offer. On 26 May 1987, plaintiff Joseph M. Persinger, as well as other members of the Persinger Group, offered to purchase the shares offered to PI by Sales One for $285 per share. Provided that such a purchase and sale were consummated, Joseph M. Persinger stated that he would make a tender offer to all PI shareholders to purchase their shares for

$300 per share. On 27 May 1987, Sales One amended its offer to sell its 5,592 PI share to PI, conditioning the offer to prevent the resale of the shares to any member or entity representing the Persinger Group.

At the 27 May 1987 directors' meeting, a majority of the PI directors rejected the Sales One offer. Having rejected that offer, they did not consider the Joseph M. Persinger offer, which was conditioned on the PI purchase of its stock offered by Sales One.

On 29 May 1987, the PI shareholders voted to approve the merger of Sales Two into PI by a margin of 68% to 31%. On the same day, the merger was consummated. The plaintiffs and all other members of the Persinger Group effectively dissented from the merger. As a result of the

merger, the shares of Southeast, Joseph M. Persinger and all other minority shareholders have been converted to the right to receive $222 per share. Mr. Carmazzi and Sales One remain as sole PI shareholders.

This case is before the Court on four certified questions:

> 1. Did West Virginia law require advance notice that a vote to repeal Bylaw §5.4 would be considered at the annual shareholders meeting held on March 9, 1987?
>
> 2. Do the facts state a claim under West Virginia law that the defendants or any of them breached any fiduciary duties they owed to PI's minority shareholders?

3. If the answer to either 1 or 2 is yes, is the remedy of the minority shareholders limited to the statutory valuation procedure under W. Va. Code § 31-1-123?

4. If the answer to 3 is no, what additional remedies do the minority shareholders have under West Virginia law?

We address these questions seriatim.

I.

The first certified question asks whether West Virginia law required advance notice that a vote to repeal Bylaw section 5.4 would be considered at the annual shareholders' meeting held on 9 March 1987.

Under West Virginia law, shareholders are entitled only to receive notice of the place, day and hour of the annual meeting. W. Va. Code 31-1-19 [1975] of the West Virginia Corporation Act provides:

> Unless otherwise provided in the bylaws, written notice stating the place, day and hour of the meeting and, in the case of a special meeting, the purpose of [sic] purposes for which the meeting is called, shall be delivered... .

Section 29 of the Model Business Corporation Act, 2d Ed., (Model Act), which is identical to W. Va. Code 31-1-19 [1975] in its notice requirements and its omission of a requirement that notice of the purpose of the annual meeting be given, explains why such notice of purpose is not required:

> The text of section 29 reflects an important difference between the annual meeting and a

> special meeting. Since the earliest days of corporate practice, the annual meeting has been regarded as a forum for free expression of shareholder views, whether or not sought by management. Thus the Model Act does not require that a notice of an annual meeting state the purpose or purposes for which the meeting is called, though it does so require in the case of special meetings. Indeed, it could not properly require that the notice of an annual meeting state the purposes for which the meeting is called in the sense of precluding consideration of any other matters, since that would limit the freedoms of stockholders to discuss matters of interest to them and restrict them to matters designated by management . . . . Model Business Corporation Act Annotated, Second Edition, (1971) at p. 599.

The official commentary to section 7.05 of the revised Model Act supports the position that notice of an annual meeting need not set forth the purposes of the meeting:

> Notice of all special meetings must include of the purpose or purposes for which the meeting is called and the matters acted upon at the meeting are limited to those within the notice of the meeting. By contrast, the notice of an annual meeting usually need not refer to any specific purpose or purposes, and any matter appropriate for shareholder action may be considered. As recognized in subsection (b), however, other provisions of the revised Model Act provide that certain types of fundamental corporate changes may be considered at an annual meeting only if specific reference to the proposed action appears in the notice of the meeting. See §§ 10.03 [Amendment of Corporate Charter], 11.03 [Merger], 12.02 [Sale of Corporate Assets other than in ordinary course], and 14.02 [Dissolution]. Model Business Corporation Act Annotated, official comment to §7.05 (3d Ed. 1984) at pp. 548-549.

The West Virginia Corporations Act, patterned after the Model Act, recognizes the same four narrow exceptions to the limited rule that no advance notice is

required. Under our Act, notice need be given only when shareholders will be required to vote on an amendment to the articles of incorporation,[3] merger,[4] sale

---

[3] W. Va. Code 31-1-107(b) [1974] provides:

> Written notice setting forth the proposed amendment [to the articles of incorporation] or a summary of the changes to be effected thereby shall be given to each shareholder of record entitled to vote thereon within the time and in the manner provided in this article for the giving of notice of meetings of shareholders. If the meeting be an annual meeting, the proposed amendment or such summary may be included in the notice of such annual meeting.

[4] W. Va. Code 31-1-117 [1974] provides:

> ... Written notice [that a proposed plan of merger or consolidation will be considered at an annual or special meeting] shall be given to each shareholder of record, whether or not entitled to vote at such meeting, not less than twenty days before such meeting, in the manner provided in this article for the giving of notice of meetings of shareholders, and, whether the

of assets,[5] or dissolution.[6] No other

---

meeting be an annual or a special meeting, shall state that the purpose or one of the purposes is to consider the proposed plan of merger or consolidation.

[5] W. Va. Code 31-1-121(b) [1974] provides:

Written notice [of a vote at a meeting of shareholders on a sale of all or substantially all of the corporation's assets] shall be given to each shareholder of record, whether or not entitled to vote at such meeting, not less than twenty days before such meeting, in the manner provided in this article for the giving of notice of meetings of shareholders, and whether the meeting be an annual or a special meeting, shall state that purpose or one of the purposes is to consider the proposed sale, lease, exchange or other disposition.

[6] W. Va. Code 31-1-126(b) [1974] provides:

Written notice shall be given to each shareholder of record entitled to vote at [a] meeting [to consider the advisability of dissolving the corporation] within the time and in the manner provided in this article for the giving of notice of meetings of shareholders, and, whether the

exceptions are mentioned. Nowhere does the West Virginia Act provide that prior notice of a proposed bylaw amendment is required before it may be considered at an annual meeting:

> The initial bylaws of a corporation shall be adopted by its board of directors. The power to alter, amend or repeal the bylaws or adopt new bylaws, subject to repeal or change by action of the shareholder or members, shall be vested in the board of directors unless reserved to the shareholders or members by the articles of incorporation. The bylaws may contain any provisions for the regulation and management of the affairs of the corporation not inconsistent with the law or the articles of incorporation. W. Va. Code 31-1-17 [1974]

---

meeting be an annual or special meeting, shall state that the purpose, or one of the purposes, of such meeting is to consider the advisability of dissolving the corporation.

Thus, a bylaw like section 5.4 may be proposed, amended or repealed by act of the shareholders at an annual meeting without advance notice.

II.

The second certified question asks whether the facts certified by the Fourth Circuit state a claim under West Virginia law that the defendants or any of them breached any fiduciary duties owed to PI's minority shareholders.

The plaintiffs argue that majority shareholders in a corporation owe a fiduciary duty to the minority shareholders as do the officers and directors. According to the plaintiffs, when directors of a corporation are on both sides of a transaction, those directors are required to demonstrate their utmost good faith. The plaintiffs

assert that the defendants violated a fiduciary duty to the minority shareholders by gaining advantage as a result of an improper use of their fiduciary position to effect the merger of PI and Sales Two and to eliminate the minority shareholders.

In assessing the fairness of events surrounding the merger transaction, we must consider two aspects: fair dealing and fair price. Fair dealing embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors and how the approvals of the directors and stockholders were obtained. Fair price relates to the economic and financial considerations of the proposed merger. See Moore, The "Interested"

Director or Officer Transaction, 4 Del.J.Corp.L. 674, 676 (1979).

A.

Part of fair dealing is the obvious duty of candor. See Weinberger v. UOP, Inc., 457 A.2d 701 (Del.Supr. 1983). Moreover, one possessing superior knowledge may not mislead any stockholder by use of corporate information to which the latter is not privy. 15 U.S.C. §§78ff and 78j(b) [Securities Exchange Act of 1934, §10(b)] and rules promulgated by the Securities and Exchange Commission thereunder, particularly Rule 10b-5; Dirks v. Securities and Exchange Commission, 463 U.S. 646 (1983; Chiarella v. United States, 445 U.S. 222 (1980); United States v. Chestman, 947 F.2d 551 (2nd Cir. 1991). The plaintiffs allege that

the appellants violated their fiduciary duty by scheming the repeal of bylaw section 5.4, which had given PI the right to purchase its own shares, in order to enable Mr. Carmazzi to purchase the absolute majority percentage of stock held by First Huntington and then buy out the shares of the corporation.

The plaintiff's contention, however, contradicts both the facts certified by the Fourth Circuit and West Virginia law. According to paragraph 14 of the Fourth Circuit's statement of facts, Mr. Carmazzi decided only after notice was mailed that the repeal of section 5.4 should be considered by the shareholders. Neither First Huntington nor Mr. Agee, the majority shareholders of the corporation, had notice before the annual meeting that a proposal to repeal section

5.4 of the bylaws was to be placed before the shareholders. Such lack of notice defeats the plaintiffs' contention that a plan had been concocted before the annual meeting to repeal the bylaw.

Furthermore, it is well-settled in West Virginia that "[a]lthough directors may occupy a fiduciary capacity in some instance, such relationship is lacking in others." Bank of Mill Creek v. Elk Horn Coal, 133 W. Va. 639, 57 S.E.2d 736, 748 (1950). It is equally well-established that at a shareholders' meeting, each shareholder, even a director-shareholder, represents himself and his own interests and in no sense acts as a fiduciary for either minority or majority shareholder. As we stated in Thurman v. Paragon Colliery Co., 82 W. Va. 49, 95 S.E. 816, 817-818 (1918):

> The reason for denying to a director of a corporation the right to vote on a matter in which he is otherwise interested than as a stockholder in the corporation is because of the fiduciary or trust relation he bears toward it. But that reason does not apply to a stockholder, and he is not denied his right to vote on any matter properly coming before a stockholders' meeting on account of any private interest he may have which is detrimental to the corporation. In Gamble v. Queens County Water Co., 123 N.Y. 91, 25 N.E. 201, 9 LRA 527, it was held: 'a shareholder has a legal right, at a meeting of the shareholders, to vote upon a measure even though he has a personal interest therein separate from other shareholders. In such a meeting each shareholder represents himself and his interests solely, and he in no sense acts as a trustee or representative of others.

Therefore, all majority shareholders acted within their right to vote for the repeal of §5.4 and violated no fiduciary duty to minority shareholders.

B.

The plaintiffs also assert that their property and voting rights were seriously affected after the 7 March 1987 redemption of corporation stock because, as a result of the retirement of the shares purchased, absolute majority control was shifted into the hands of First Huntington.[7] The plaintiffs contend that the merger arose as a result of the plan developed by the defendants to enable Mr. Carmazzi to acquire the majority of stock.

A West Virginia corporation has the general power to redeem its own stock.

---

[7] It is shown that while the interest of the Persinger Group increased from 16.12% to 17.43% by reason of the action taken, the interest of First Huntington increased in the aggregate from 48% to 52% absolute majority position.

Under W. Va. Code 31-1-83 [1974] (captioned "Rights of Corporation to acquire and dispose of its shares"), "a corporation shall have the right to purchase, take, receive or otherwise acquire, own, pledge, transfer or otherwise dispose of its own share."

We may assume that if the plan were shown to be illegal, ultra vires or fraudulent, it might constitute a breach of fiduciary duty. We may also assume that a breach would occur if majority stockholders used their voting power for their own benefit, for some self-serving purpose adverse to the interests of the corporation and its stockholders as such. We have no such case here.[8] The record

---

[8] Likewise, we find no self-serving or ulterior motive in the Board's failure to consider the 27 May 1987 offer of Joseph M. Persinger to purchase the PI shares held by Sales One. Simply stated,

clearly shows that the plan did not originate with the defendants. The offer to sell was put forward by various minority stockholders who requested that the Board offer to purchase their shares if the Persinger Group remained in the corporation.

In short, the fact that First Huntington gained a majority of the voting stock by dint of the 7 March 1987 redemption is not itself a badge of fraud. The purchase and retirement of some shares of common stock necessarily have the effect of increasing the proportionate voting power of all other holders of common stock. As the Fourth

---

Mr. Persinger's offer was conditioned on the purchase and sale of PI shares to PI by Sales One. Because the Board rejected the Sales One offer, the circumstances necessary for consideration of Mr. Persinger's offer never existed.

Circuit's statement of facts shows, the percentage of the outstanding stock of PI owned by the Persinger Group increased in the same proportion as First Huntington's. The Persinger Group lost no voting power by the transaction, but had been and remained minority stockholders. See Baker V. Standard Lime & Stone Co., 203 Md. 270, 100 A.2d 822 (1953). We find no breach of duty in the Board of Directors' vote to redeem corporate stock.

C.

Finally, the plaintiffs allege that the defendants devised and executed a plan to freeze out the minority shareholders of any benefit from their ownership or investment in the corporation by PI's cash-out merger. According to the plaintiffs, the

elimination of minority shareholders by merger for the benefit of one selected shareholder is not a legitimate business purpose and is recognized under general corporation law as a breach of a fiduciary duty.

Under the business purpose doctrine, a corporation's merger transaction caused by a majority stockholder that occurs solely for the purpose of cashing out minority stockholders fails to meet the business purpose requirement. Singer v. Magnavox Co., 380 A.2d 969, 978 (Del.Supr. 1977). In Weinberger v. UOP, Inc., 457 A.2d 701, 715 (Del.Supr. 1983), however, the Supreme Court of Delaware struck down the business purpose requirement articulated in Singer, supra, stating:

> In view of the fairness which has long been applicable to

> parent-subsidiary mergers . . ., the expanded appraisal remedy now available to shareholders, and the broad discretion of [a court] to fashion such relief as the facts of a given case may dictate, we do not believe any additional meaningful protection is afforded minority shareholders by the business purpose requirement."

We have never agreed with the business purpose doctrine because attempting to infer the motivations behind a majority stockholder's buyout of minority shares is like trying to catch the wind in a net. In the often clashing cross-purposes and constant friction of haggling and dickering that characterize a corporation, it is perfectly reasonable for a majority shareholder to rid himself of minority shareholders who he perceives may compromise fundamentally that corporation's interests. Consequently, our rule in West Virginia is that when a

majority stockholder or majority stockholders seek to effect a corporation's merger, they may do so for any purpose whatsoever, so long as the terms tendered to the minority stockholders accurately reflect the fair market value of the minority interest.

Under W. Va. Code 31-1-123 [1974], the West Virginia legislature has created a sophisticated scheme to assure fairness in a cash-out merger.[9] In Matter of Fair

---

[9] W. Va. Code 31-1-123 states in pertinent part:

> (d) If within thirty days after the date on which such corporate action is effected the fair value of such shares is agreed upon between any such dissenting shareholder and the corporation, payment therefor shall be made within ninety days after the date on which such corporate action was effected, upon surrender of the certificate or certificates representing such shares. Upon payment of the agreed value the dissenting shareholder shall cease to have any interest in such shares.

Value of Shares, 184 W.Va. 96, 399 S.E.2d 678, 682 (1990), this Court expressly acknowledged that cash out mergers are not illegal:

> Courts have developed several general rules regarding dissenters' rights statutes. The first is that ordinarily such a statute provides the exclusive remedy for a dissenting shareholder in the absence of a showing of fraud, unfairness or illegality. See Generally 18A Am. Jur. 2d Corporations § 809. Although our statute does not contain any specific provisions as to

---

> (e) If within such period of thirty days, a dissenting shareholder and the corporation do not so agree, then the corporation shall within thirty days after receipt of the written demand must be given within sixty days after the date on which such corporate action was effected, file a complaint in a court of general civil jurisdiction requesting that the fair value of such shares be found and determined, or the corporation may file such complaint at any time within such sixty-day period at its own election.

exclusivity, we agree with the general rule.

The facts in the case before us show no fraud, unfairness, or illegality on the part of the defendants in the cash-out merger. Indeed, the cash-out merger was required by NBofC -- the financier of the purchase -- and not by any of the defendants. Moreover, it appears that Mr. Carmazzi, through his personal guarantee backing up the NBofC loan was willing to accept financial exposure in order to restore morale and end the disruption and strife caused by the Persinger Group.

In sum, we conclude that the statement of facts contained in the Fourth Circuit Certification Order makes no showing that the minority shareholders were treated unfairly, that the defendants acted improperly with regard

to the minority shareholders or that the defendants gained any particular advantage as a result of an improper use of their fiduciary position. Because the answers to certified questions 1 and 2 are no, questions 3 and 4 of the certified questions need not be addressed.

Certified questions answered.

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 17th day of February, 1994, the following order was made and entered:

Joseph M. Persinger, on behalf of himself and all other shareholders of Persingers, Incorporated, a West Virginia corporation; Kenneth T. Williamson; Carol Preston Williamson, Plaintiffs

vs.) No. 21804

R. Frank Carmazzi; Sales One, Inc., a West Virginia corporation; Sales Two, Inc., a West Virginia corporation; John C. Morton; W. Guy Wiles, Jr.; William A. Tantlinger; Persingers Incorporated, a West Virginia corporation; William F. Agee; First Huntington National Bank, N.A., Defendants

The Court, having maturely considered the certificate of the United States Court of Appeals for the Fourth Circuit, the brief Amicus Curiae tendered on behalf of Robert Runyon and minority stockholders, the transcript of the record herein, and the oral argument and

briefs of counsel thereon, doth hereby answer Question No. 1 in the negative, finding that a bylaw may be proposed, amended or repealed by act of the shareholders at an annual meeting without advance notice. The Court doth hereby answer No. 2 in the negative, finding that majority shareholders violated no fiduciary duty to minority shareholders by voting for the repeal of section 5.4, by voting to redeem corporate stock, or by the cash-out merger; all of which is ordered to be certified to the United States Court of Appeals for the Fourth Circuit.

The syllabus of points adjudicated, prefixed to the written opinion prepared by Justice Neely, was concurred in by Chief Justice Brotherton and Justices Miller, McHugh and Workman.

A True Copy

Attest: _____
Clerk, Supreme Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
August 16, 1993, 9:04 a.m.

No. 92-1832(L)

JOSEPH M. PERSINGER, on half of themselves and all other shareholders of Persingers, Incorporated, a West Virginia corporation; KENNETH T. WILLIAMSON; CAROL PRESTON WILLIAMSON

Plaintiffs-Appellants

v.

R. FRANK CARMAZZI; SALES ONE, INC., a West Virginia corporation; SALES TWO, INC., a West Virginia corporation; JOHN C. MORTON; W. GUY WILES, JR.; WILLIAM A. TANTLINGER; PERSINGERS INCORPORATED, a West Virginia corporation; WILLIAM F. AGEE; FIRST HUNTINGTON NATIONAL BANK, N.A.

Defendants-Appellees

ORDER OF CERTIFICATION TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

This is an appeal from the United States District Court for the Southern

District of West Virginia, at Charleston. Because the resolution of issues presented on appeal requires resolution of questions of West Virginia law that may be determinative of this case now pending in this Court, and as to which it appears to this Court that there is no controlling precedent in the decisions of the Supreme Court of Appeals of West Virginia, pursuant to West Virginia Code § 51-1A-1, et seq., we request that the following questions presented be decided by the Supreme Court of Appeals of West Virginia.

I. STATEMENT OF ALL FACTS RELEVANT TO THE QUESTIONS CERTIFIED WHICH SHOW FULLY THE NATURE OF THE CONTROVERSY IN WHICH THE QUESTIONS AROSE.

1. Persingers, Inc., is a West Virginia corporation with its principal

business in Charleston, West Virginia. At all relevant times, Persingers has engaged in the business of selling mining and industrial machinery, tools, parts and supplies throughout southern West Virginia.

2. Meredith Persinger was President and CEO of Persingers from 1964 until March 2, 1985. Meredith Persinger's son, Thomas Persinger, was a director of, Secretary of, and counsel to Persingers until March 2, 1982. Meredith Persinger's son, Powers Persinger, was Treasurer of Persingers. Thomas Persinger, Joseph Persinger, Powers Persinger, Meredith Persinger, individually and as Executor and Trustee of his deceased sister Helen P. Ream's estate, Meredith Persinger's wife, and other close family members are

hereinafter referred to as the "Persinger Group."

3. On March 2, 1985, John A. Persinger, Meredith Persinger's nephew, owned 5592 shares or 48% of Persingers stock. On that date, the shareholders elected six directors: Meredith, Thomas, and John Persinger, R. Frank Carmazzi, W. Guy Wiles, Jr. and John C. Morton. Carmazzi was then elected to replace Meredith Persinger as President and CEO, and Meredith Persinger was elected Chairman of the Board. Thomas Persinger declined to accept the office of Secretary to which he had been elected, and resigned as counsel for Persingers.

4. John A. Persinger died on March 8, 1985. The First Huntington National Bank (First Huntington) was appointed and qualified as Executor of the estate of

John A. Persinger. William Agee, Vice President and Trust Officer of First Huntington, thereafter represented the interests of the John Persinger estate.

5. At a special meeting of the shareholders on September 17, 1985, Agee was elected as a director of Persingers to fill the vacancy resulting from John Persinger's death.

6. After John Persinger's death, Meredith Persinger and Thomas Persinger continued as directors of Persingers, but refused to attend the board meetings. Members of the Persinger Group attempted to secure an agreement with First Huntington whereby they would be entitled to three members of a seven-member board and Meredith Persinger would become chairman and CEO.

7. On February 10, 1986, notice was given to the Persinger shareholders that adoption of a new set of bylaws was to be considered at an annual meeting on March 1, 1986. Included in these proposed bylaws was a corporate policy regarding the purchase of shares by directors and officers as a protective measure for minority shareholders.

8. At the March 1, 1986 annual meeting, the following revision in the bylaws was approved:

> Section 5.4 Purchase of Stock
>
> (a) It is the policy of this corporation to purchase, for corporate purposes, any shares of the capital stock of this corporation that may be available for purchase, from time to time, if the Board of Directors shall determine in each case that the price and terms of sale are acceptable and that the cash situation of the corporation warrants such purchase.

* * *

(d) No officer or director of this corporation shall purchase any shares of the capital stock of this corporation from any other shareholder unless the corporation shall first have the opportunity, after notice to and authorization by the Board of Directors, to purchase such shares at the same price and upon equivalent terms, and the Board of Directors shall determine that it is not in the best interests of the corporation at such time to purchase such shares at such price and on such terms.

(e) Any officer or director of this corporation who negotiates with any shareholder of the corporation for the purchase of any shares of the capital stock of the corporation shall be deemed to be negotiating on behalf of the corporation, but shall not have the power to bind the corporation in the absence of specific authorization by the Board of Directors; and any officer or director who shall purchase any shares of the capital stock of this corporation without complying with this Section 5.4 shall be conclusively deemed to have purchased such shares on behalf of the corporation, and upon tender by the corporation of the purchase price of such shares shall, upon approval of such purchase of Directors, forthwith deliver the certificate or certificates

representing the same to the corporation.

(f) Any shares of its capital stock acquired by this corporation may be held as treasury stock or returned to the status of authorized but unissued stock, as the Board of Directors may determine, and, in the absence of any such determination, shall be held as treasury shares. Any shares of capital stock so acquired may thereafter be sold or disposed of as the Board of Directors shall determine.

* * *

9. At the annual meeting on March 1, 1986, Carmazzi, Morton, Wiles, and Agee voted the shares held or represented by proxy to fix the number of corporate directors at five.

10. On October 30, 1986, Agee, on behalf of First Huntington, advised Meredith Persinger that First Huntington would sell him its shares of Persingers for $275 per share and that the offer was good for 21 days.

11. In November, 1986, Carmazzi, Wiles and Morton met with Agee to discuss acquiring First Huntington's shares of stock.

12. On January 9, 1987, a letter of intent from Carmazzi, Morton and Wiles was accepted by Agee on behalf of First Huntington. The letter offered to purchase all of First Huntington's 5,592 shares for $275 per share, subject to the ability of the offerers to obtain financing. The letter asked that the stock not be sold for 60 days. Agree added two conditions: (1) that the executor (First Huntington) reserved the right to retain up to 100 shares, and (2) acceptance of the letter was subject to the execution of a purchase agreement agreeable to all parties.

13. On February 16, 1987, notice was sent to the shareholders of Persingers that their annual meeting would be held on March 7, 1987. This notice did not state that the shareholders would be asked to vote on the repeal of Section 5.4 of the bylaws.

14. After the notice was mailed, Carmazzi decided to have the shareholders consider the repeal of § 5.4 at the annual meeting.

15. At the March 7 meeting, Morton moved to repeal Section 5.4, and Agee seconded the motion. Thomas argued that the notice of the meeting was inadequate because it failed to inform the shareholders that the repeal of § 5.4 would be considered. Carmazzi, Morton, Wiles, and Agee voted their shares and proxies in favor of the motion to repeal

§ 5.4. Thomas Persinger voted the shares and proxies held by him against the motion. A total of 69% of the shares voted in favor of repeal.

16. At the request of Carmazzi, on behalf of Persingers, Persingers obtained an appraisal as of April 30, 1986, of the fair market value of a minority interest of the common stock of Persingers from Coopers & Lybrand, independent certified accountants. The purpose of the appraisal was for corporate planning. The value determined by Coopers & Lybrand for a minority interest of the common stock of Persingers was $220 per share.

17. Before the annual shareholders' meeting held on March 7, 1987, certain shareholders, by letters sent to Persingers, requested that their stock be redeemed. On November 20, 1986,

Persingers' directors authorized redemption of 40 shares of the stock owned by one of these shareholders at a price of $220 per share.

18. In a letter dated December 13, 1986, Howard M. Persinger, on behalf of himself and fellow shareholders Sylvia P. Lentz, Sarah P. Altizer, and Anna S. Athey, indicated that he was informed that the Board of Persingers had offered to purchase the shares of the Persinger Group and that the Persinger Group had until December 15, 1986, to accept or reject this offer. He stated that he and the other shareholders mentioned in his letter desire to continue to own their Persingers shares if the Persinger Group accepted the offer of the company to buy their shares, but, should the Persinger Group reject that offer and remain in the

corporation, those shareholders wanted out and accordingly requested the Board to offer to purchase their shares.

None of the shares of the Persinger Group were offered to Persingers pursuant to its offer of December 15, 1986.

19. At the meeting of the Board of Directors held on March 7, 1987, the directors voted to redeem all of the shares offered for redemption at a price of $220 per share. No notice of the proposed redemptions of stock was given to Thomas Persinger, a director of Persingers, or to the shareholders of Persingers. Thomas Persinger, however, was in attendance at the March 7 directors' meeting and did not vote against these redemptions; instead, he abstained because of prior discussions among the directors relating to the

possible purchase by Persingers of the shares owned by the Persinger Group.

20. As a consequence of these redemptions, the number of outstanding shares of Persingers was reduced from 11,610 to 10,738, the percentage of the outstanding stock of Persingers owned by the Persinger Group increased from 16.12% to 17.43%, and the percentage of outstanding stock owned by First Huntington increased from 48.16% to 52.08%.

21. On March 7, 1987, Carmazzi procured an agreement from First Huntington whereby it granted to Carmazzi the right to purchase First Huntington's shares of Persingers at a price of $275 per share, subject to Carmazzi's ability to obtain financing. First Huntington agreed not to sell or agree to sell its

shares to any other person for 45 days so that Carmazzi would have adequate time to pursue financing for the transaction, and Carmazzi agreed to pursue the obtaining of adequate financing for the transaction actively and in food faith.

The negotiations between Carmazzi and First Huntington regarding this agreement were not disclosed to Thomas Persinger or to the shareholder of Persingers before or during the directors' and shareholders' meetings held on March 7, 1987. This agreement, by its terms, expired on April 21, 1987.

22. In mid-March, 1987, Carmazzi caused Sales One, a West Virginia corporation with its principal office in Charleston, West Virginia, to be formed. Carmazzi contributed to Sales One the 40 shares of Persingers stock owned by him

at that time plus $1,000, receiving in exchange therefor all of the outstanding stock of Sales One. Thereafter, in early April, 1987, Sales One caused the formation of Sales Two, a West Virginia corporation with its principal office in Charleston, West Virginia. Sales Two was a wholly-owned subsidiary of Sales One.

23. Carmazzi thereafter began negotiations with respect to the financing of the purchase with the National Bank of Commerce (NBofC). In those negotiations, NBofC indicated it would require purchase of 100% of the stock of Persingers if it were to make the loan. Between March 9, 1987, and March 13, 1987, Carmazzi developed a financing plan, and on the latter date, he submitted to the NBofC a plan for financing and accomplishing the purchase.

This plan provided for the purchase of the remaining outstanding shares of Persingers by means of a merger, and took into account that the shareholders of Persingers who objected to the merger would have the dissenters' right to have the fair market value of their shares determined by a court. This financing plan was reduced to writing on April 9, 1987, at which time a loan commitment letter was executed by NBofC. The financing was not consummated until the execution by Carmazzi and NBofC of a Loan Agreement on April 17, 1987.

24. Pursuant to the Loan Agreement, NBofC agreed to lend up to $1,800,000. To secure this loan, NBofC required Carmazzi's personal guarantee and pledge of all the stock of Sales One, Sales Two and the Persingers stock owned by Sales

One. To further secure the loan after consummation of the merger of Sales Two and Persingers, the Loan Agreement required that a first lien security interest be given to NBofC in substantially all of the assets of Persingers, subject to Persingers' requirements for payment to its shareholders of the consideration due them under the merger agreement or the fair market value of Persingers shares determined with respect to dissenters.

25. On April 17, 1987, following execution of the loan Agreement, Sales One and Sales Two jointly borrowed the sum of $1,537,800 from NBofC. Utilizing these loan proceeds, Sales One acquired all of First Huntington's Persingers shares at a price of $220 per share. As a consequence Sales One, which is wholly

owned by Carmazzi, acquired (including the 40 shares of Persingers stock already owned by it) 52.45% of the issued and outstanding stock of Persingers.

26. Persingers requested Coopers & Lybrand to update its appraisal of the fair market value of a minority stock interest in Persingers. On or after March 27, 1987, Persingers received the updated Coopers & Lybrand appraisal, the purpose of which was corporate planning, which determined that the shares constituting a minority interest in Persingers had a fair market value as of February 28, 1987, of $222 per share.

27. Thereafter, Carmazzi, through Sales One and Sales Two, proposed to Persingers a merger agreement under which (a) Sales Two would be merged with and into Persingers, which would be the

surviving corporation, and (b) each of the common shares of Persingers outstanding before consummation of the merger, other than the stock of Persingers owned by Sales One, would be converted into the right to receive $222 in cash.

28. On April 18, 1987, a notice was mailed to all Persingers directors informing them that a meeting would be held on April 27, 1987, to consider the Sales One and Sales Two offer. The notice was accompanied by a copy of the proposed merger agreement and a draft of the proxy statement to be sent to Persingers shareholders.

29. A directors' meeting was then held on April 27, 1987, at which time the resignation of Agee as a director of Persingers was accepted and William A.

Tantlinger, a friend of Carmazzi, was elected to succeed Agee as a director of Persingers.

30. Between April 17 and April 27, 1987, Carmazzi, Wiles, Morton, and Tantlinger met with Charles B. Stacy and David B. Shapiro, corporate counsel to Persingers, and discussed the merger proposal. These meetings were requested by those individuals to seek guidance on the merger. Thomas Persinger did not attend these meetings.

31. At the meeting of the Persingers Board of Directors held on April 27, 1987, the Board considered the merger agreement proposed by Sales One and Sales Two. At this 13-hour meeting, a majority of the directors of Persingers, with Carmazzi abstaining and Thomas Persinger dissenting, voted to

recommend this merger to the shareholders of Persingers. The minutes of this directors meeting reflect that the directors, in approving the merger, took into consideration the economic outlook and prospects for Persingers' business and its shareholders, the alternatives of liquidation, sale to an ESOP or a business or person other than Carmazzi, the book value analysis presented to the meeting by Thomas Persinger, and the valuation reports prepared by Coopers & Lybrand. It was noted that the Coopers & Lybrand reports had been prepared for general corporate purposes, did not take into account any proposed transaction, and did not constitute a fairness opinion. The Board determined that a fairness opinion was not necessary. After extensive discussion, the Board of

Directors of Persingers approved the merger agreement and determined to submit it to the shareholders of Persingers for their consideration.

32. On April 28, 1987, Persingers mailed a notice of a special shareholders' meeting called for May 19, 1987. The purpose of the meeting was to consider and act upon the merger of Persingers and Sales Two. The notice of the meeting was accompanied by a proxy statement that described, among other things, the transaction and the dissenters' rights of the shareholders. The proxy statement included as an appendix the two appraisal reports of Coopers & Lybrand.

33. By letter dated May 5, 1987, to Carmazzi as President of Persingers, Southeast Bank, N.A. (Southeast), the

trustee of the estate of a deceased shareholder, expressed its opinion that the $222 per share cash offer for its Persingers shares appeared to be low and indicated its desire to talk with Carmazzi about receiving a higher value for its shares.

34. On May 11, 1987, Southeast, as Trustee under the Will of B. R. Williamson, deceased, the owner of 636 shares of the stock of Persingers (5.92% of the corporation's outstanding stock), and Joseph M. Persinger instituted this present action on behalf of themselves and all other shareholders against Carmazzi, Wiles, Morton, Tantlinger, Sales One, Sales Two and Persingers; by amended complaint, Agee and First Huntington were added as defendants.

35. In their complaint, plaintiffs sought to enjoin the merger of Sales Two into Persingers and claimed damages against the directors. The district court refused to issue a temporary restraining order.

36. The meeting of the shareholders of Persingers called for May 19, 1987, was adjourned until May 28, 1987.

37. On May 21, 1987, Joseph M. Persinger, by counsel, offered to purchase: (1) all shares held by the defendants in this civil action, including the John A. Persinger bloc purchased by Carmazzi and Sales One from First Huntington, for a cash price of $300 per share; and (2) to purchase from all other shareholders all shares that they wished to sell for a cash price of $300 per share. This offer was subject

to two conditions: (1) that all of the defendants in this civil action would sell all of their shares to Joseph M. Persinger, and (2) that Joseph M. Persinger could obtain financing for his offer in the amount of $1,800,000 by noon on Tuesday, May 26, 1987. This offer was rejected by Carmazzi and Sales One on May 21, 1987. This offer was disclosed to the shareholders of Persingers.

38. On May 21, 1987, Sales One offered to sell its 5,592 shares of Persingers acquired from First Huntington to Persingers for a price of $275 per share. A meeting of the directors of Persingers was called by Wiles and Morton for May 27, 1987, to consider the Sales One offer.

39. On May 26, 1987, Joseph M. Persinger, 1866 Holdings, Inc., a

Delaware corporation owned by Joseph M. Persinger, and other members of the Meredith Persinger Group offered to purchase the shares offered to Persingers by Sales One on May 21, 1987, for $285 per share. Subject to the condition that closing of the purchase and sale to Joseph M. Persinger and 1866 Holdings, Inc., of the said 5,592 shares from Persingers took place, Joseph M. Persinger and 1866 Holdings, Inc., stated they would make a tender offer to all shareholders of Persingers to purchase their shares for $300 per share.

40. On May 27, 1987, Sales One amended its offer to sell its 5,592 shares to Persingers, conditioning that offer to prevent the resale of said shares to any member of or entity representing the Persinger Group.

41. At the directors' meeting held on May 27, 1987, Wiles, Morton and Tantlinger, constituting a majority of the directors of Persingers, rejected the offer of Sales One to sell its 5,592 shares of Persingers. Because the directors determined to reject the Sales One offer, they did not consider the Joseph M. Persinger offer, which was conditioned upon purchase by Persingers of its stock offered by Sales One.

42. On May 29, 1987, at the reconvened meeting of shareholders, the shareholders of Persingers voted to approve the merger of Sales Two into Persingers. Of the outstanding 10,738 shares of Persingers, holders of 68% thereof, or 7,302 shares, voted in favor of the merger, and holders of 31%

thereof, or 3,328 shares, voted against the merger.

43. On or before the vote on the merger was taken, Southeast, Joseph M. Persinger and all other members of the Persinger Group filed their written objection to the proposed merger. At the meeting, the plaintiffs in this action and all other members of the Persinger Group voted against the merger. The plaintiffs and all other members of the Persinger Group have dissented from the Merger.

44. On May 29, 1987, the merger of Sales Two with and into Persingers was consummated.

45. As a result of the merger, Persingers is indebted to NBofC for the prior indebtedness of defendants Carmazzi and Sales One in an amount up to

$1,800,000, and NBofC has security interest in all of the assets of Persingers to secure the indebtedness in an amount up to $1,800,000.

46. As a result of the merger, the shares of Southeast, Joseph M. Persinger, and all other minority shareholders, have been converted to the right to receive $222 per share. Carmazzi and Sales One (wholly owned by him) are the sole shareholders of Persingers, holding all of its shareholders' equity, approximately $1,100,000 at book value.

II. QUESTIONS OF LAW TO BE ANSWERED

1. Did West Virginia law require advance notice that a vote to repeal Bylaw § 5.4 would be considered at the annual shareholders meeting held on March 9, 1987?

2. Do the facts state a claim under West Virginia law that the defendants or any of them breached any fiduciary duties they owed to Persingers' minority shareholders?

3. If the answer to either 1 or 2 is yes, is the remedy of the minority shareholders limited to the statutory valuation procedure under W. Va. Code § 31-1-123?

4. If the answer to 3 is no, what additional remedies do the minority shareholders have under West Virginia law?

Entered with the concurrences of Judge Russell and Judge Murnaghan.

/s/ K. K. Hall
U.S. Circuit Judge

FILED: June 18, 1993

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 92-1832(L)

JOSEPH M. PERSINGER, on behalf of themselves and all other shareholders of Persingers, Incorporated, a West Virginia corporation; KENNETH T. WILLIAMSON; CAROL PRESTON WILLIAMSON

Plaintiffs-Appellants

v.

R. FRANK CARMAZZI; SALES ONE, INC., a West Virginia corporation; SALES TWO, INC., a West Virginia corporation; JOHN C. MORTON; W. GUY WILES, JR.; WILLIAM A. TANTLINGER; PERSINGERS INCORPORATED, a West Virginia corporation; WILLIAM F. AGEE; FIRST HUNTINGTON NATIONAL BANK, N.A.

Defendants-Appellees

ORDER OF CERTIFICATION TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

This is an appeal from the United States District Court for the Southern District of West Virginia, at Charleston. Because the resolution of issues presented on appeal requires resolution of questions of West Virginia law that may be determinative of this case now pending in this Court, and as to which it appears to this Court that there is no controlling precedent in the decisions of the Supreme Court of Appeals of West Virginia, pursuant to West Virginia Code § 51-A1-1, et seq., we request that the following questions presented be decided by the Supreme Court of Appeals of West Virginia.

I. STATEMENT OF ALL FACTS RELEVANT TO THE QUESTIONS CERTIFIED WHICH SHOW FULLY THE NATURE OF THE CONTROVERSY IN WHICH THE QUESTIONS AROSE.

1. Persingers, Inc., is a West Virginia corporation with its principal business in Charleston, West Virginia. At all relevant times, Persingers has engaged in the business of selling mining and industrial machinery, tools, parts and supplies throughout southern West Virginia.

2. Meredith Persinger was President and CEO of Persingers from 1964 until March 2, 1985. Meredith Persinger's son, Thomas Persinger, was a director of, Secretary of, and counsel to Persingers until March 2, 1982. Meredith Persinger's son, Powers Persinger, was Treasurer of Persingers. Thomas Persinger, Joseph Persinger, Powers Persinger, Meredith Persinger, individually and as Executor and Trustee of his deceased sister Helen P. Ream's

estate, Meredith Persinger's wife, and other close family members are hereinafter referred to as the "Persinger Group."

3. On March 2, 1985, John A. Persinger, Meredith Persinger's nephew, owned 5592 shares or 48% of Persingers stock. On that date, the shareholders elected six directors: Meredith, Thomas, and John Persinger, R. Frank Carmazzi, W. Guy Wiles, Jr. and John C. Morton. Carmazzi was then elected to replace Meredith Persinger as President and CEO, and Meredith Persinger was elected Chairman of the Board. Thomas Persinger declined to accept the office of Secretary to which he had been elected, and resigned as counsel for Persingers.

4. John A. Persinger died on March 8, 1985. The First Huntington National

Bank (First Huntington) was appointed and qualified as Executor of the estate of John A. Persinger. William Agee, Vice President and Trust Officer of First Huntington, thereafter represented the interests of the John Persinger estate.

5. At a special meeting of the shareholders on September 17, 1985, Agee was elected as a director of Persingers to fill the vacancy resulting from John Persinger's death.

6. After John Persinger's death, Meredith Persinger and Thomas Persinger continued as directors of Persingers, but refused to attend the board meetings. Members of the Persinger Group attempted to secure an agreement with First Huntington whereby they would be entitled to three members of a seven-member board

and Meredith Persinger would become chairman and CEO.

7. On February 10, 1986, notice was given to the Persinger shareholders that adoption of a new set of bylaws was to be considered at an annual meeting on March 1, 1986. Included in these proposed bylaws was a corporate policy regarding the purchase of shares by directors and officers as a protective measure for minority shareholders.

8. At the March 1, 1986 annual meeting, the following revision in the bylaws was approved:

> Section 5.4 Purchase of Stock
>
> (a) It is the policy of this corporation to purchase, for corporate purposes, any shares of the capital stock of this corporation that may be available for purchase, from time to time, if the Board of Directors shall determine in each case that the price and terms of sale are acceptable and that the cash

situation of the corporation warrants such purchase.

* * *

(d) No officer or director of this corporation shall purchase any shares of the capital stock of this corporation from any other shareholder unless the corporation shall first have the opportunity, after notice to and authorization by the Board of Directors, to purchase such shares at the same price and upon equivalent terms, and the Board of Directors shall determine that it is not in the best interests of the corporation at such time to purchase such shares at such price and on such terms.

(e) Any officer or director of this corporation who negotiates with any shareholder of the corporation for the purchase of any shares of the capital stock of the corporation shall be deemed to be negotiating on behalf of the corporation, but shall not have the power to bind the corporation in the absence of specific authorization by the Board of Directors; and any officer or director who shall purchase any shares of the capital stock of this corporation without complying with this Section 5.4 shall be conclusively deemed to have purchased such shares on behalf of the corporation, and upon tender by the corporation of the purchase

price of such shares shall, upon approval of such purchase of Directors, forthwith deliver the certificate or certificates representing the same to the corporation.

(f) Any shares of its capital stock acquired by this corporation may be held as treasury stock or returned to the status of authorized but unissued stock, as the Board of Directors may determine, and, in the absence of any such determination, shall be held as treasury shares. Any shares of capital stock so acquired may thereafter be sold or disposed of as the Board of Directors shall determine.

* * *

9. At the annual meeting on March 1, 1986, Carmazzi, Morton, Wiles, and Agee voted the shares held or represented by proxy to fix the number of corporate directors at five.

10. On October 30, 1986, Agee, on behalf of First Huntington, advised Meredith Persinger that First Huntington would sell him its shares of Persingers

for $275 per share and that the offer was good for 21 days.

11. In November, 1986, Carmazzi, Wiles and Morton met with Agee to discuss acquiring First Huntington's shares of stock.

12. On January 9, 1987, a letter of intent was drafted by Carmazzi, Wiles and Morton, to purchase all but 100 shares of First Huntington's shares for $275 per share, subject to obtaining financing.

13. On February 16, 1987, notice was sent to the shareholders of Persingers that their annual meeting would be held on March 7, 1987. This notice did not state that the shareholders would be asked to vote on the repeal of Section 5.4 of the bylaws.

14. After the notice was mailed, Carmazzi decided to have the shareholders

consider the repeal of § 5.4 at the annual meeting.

15. At the March 7 meeting, Morton moved to repeal Section 5.4, and Agee seconded the motion. Thomas argued that the notice of the meeting was inadequate because it failed to inform the shareholders that the repeal of § 5.4 would be considered. Carmazzi, Morton, Wiles, and Agee voted their shares and proxies in favor of the motion to repeal § 5.4. Thomas Persinger voted the shares and proxies held by him against the motion. A total of 69% of the shares voted in favor of repeal.

16. At the request of Carmazzi, on behalf of Persingers, Persingers obtained an appraisal as of April 30, 1986, of the fair market value of a minority interest of the common stock of Persingers from

Coopers & Lybrand, independent certified accountants. The purpose of the appraisal was for corporate planning. The value determined by Coopers & Lybrand for a minority interest of the common stock of Persingers was $220 per share.

17. Before the annual shareholders' meeting held on March 7, 1987, certain shareholders, by letters sent to Persingers, requested that their stock be redeemed. On November 20, 1986, Persingers' directors authorized redemption of 40 shares of the stock owned by one of these shareholders at a price of $220 per share.

18. In a letter dated December 13, 1986, Howard M. Persinger, on behalf of himself and fellow shareholders Sylvia P. Lentz, Sarah P. Altizer, and Anna S. Athey, indicated that he was informed

that the Board of Persingers had offered to purchase the shares of the Persinger Group and that the Persinger Group had until December 15, 1986, to accept or reject this offer. He stated that he and the other shareholders mentioned in his letter desire to continue to own their Persingers shares if the Persinger Group accepted the offer of the company to buy their shares, but, should the Persinger Group reject that offer and remain in the corporation, those shareholders wanted out and accordingly requested the Board to offer to purchase their shares.

None of the shares of the Persinger Group were offered to Persingers pursuant to its offer of December 15, 1986.

19. At the meeting of the Board of Directors held on March 7, 1987, the directors voted to redeem all of the

shares offered for redemption at a price of $220 per share. No notice of the proposed redemptions of stock was given to Thomas Persinger, a director of Persingers, or to the shareholders of Persingers. Thomas Persinger, however, was in attendance at the March 7 directors' meeting and did not vote against these redemptions; instead, he abstained because of prior discussions among the directors relating to the possible purchase by Persingers of the shares owned by the Persinger Group.

20. As a consequence of these redemptions, the number of outstanding shares of Persingers was reduced from 11,610 to 10,738, the percentage of the outstanding stock of Persingers owned by the Persinger Group increased from 16.12% to 17.43%, and the percentage of

outstanding stock owned by First Huntington increased from 48.16% to 52.08%.

21. On March 7, 1987, Carmazzi procured an agreement from First Huntington whereby it granted to Carmazzi the right to purchase First Huntington's shares of Persingers at a price of $275 per share, subject to Carmazzi's ability to obtain financing. First Huntington agreed not to sell or agree to sell its shares to any other person for 45 days so that Carmazzi would have adequate time to pursue financing for the transaction, and Carmazzi agreed to pursue the obtaining of adequate financing for the transaction actively and in food faith.

The negotiations between Carmazzi and First Huntington regarding this agreement were not disclosed to Thomas

Persinger or to the shareholder of Persingers before or during the directors' and shareholders' meetings held on March 7, 1987. This agreement, by its terms, expired on April 21, 1987.

22. In mid-March, 1987, Carmazzi caused Sales One, a West Virginia corporation with its principal office in Charleston, West Virginia, to be formed. Carmazzi contributed to Sales One the 40 shares of Persingers stock owned by him at that time plus $1,000, receiving in exchange therefor all of the outstanding stock of Sales One. Thereafter, in early April, 1987, Sales One caused the formation of Sales Two, a West Virginia corporation with its principal office in Charleston, West Virginia. Sales Two was a wholly-owned subsidiary of Sales One.

23. Carmazzi thereafter began negotiations with respect to the financing of the purchase with the National Bank of Commerce (NBofC). In those negotiations, NBofC indicated it would require purchase of 100% of the stock of Persingers if it were to make the loan. Between March 9, 1987, and March 13, 1987, Carmazzi developed a financing plan, and on the latter date, he submitted to the NBofC a plan for financing and accomplishing the purchase. This plan provided for the purchase of the remaining outstanding shares of Persingers by means of a merger, and took into account that the shareholders of Persingers who objected to the merger would have the dissenters' right to have the fair market value of their shares determined by a court. This financing

plan was reduced to writing on April 9, 1987, at which time a loan commitment letter was executed by NBofC. The financing was not consummated until the execution by Carmazzi and NBofC of a Loan Agreement on April 17, 1987.

24. Pursuant to the Loan Agreement, NBofC agreed to lend up to $1,800,000. To secure this loan, NBofC required Carmazzi's personal guarantee and pledge of all the stock of Sales One, Sales Two and the Persingers stock owned by Sales One. To further secure the loan after consummation of the merger of Sales Two and Persingers, the Loan Agreement required that a first lien security interest be given to NBofC in substantially all of the assets of Persingers, subject to Persingers' requirements for payment to its

shareholders of the consideration due them under the merger agreement or the fair market value of Persingers shares determined with respect to dissenters.

25. On April 17, 1987, following execution of the loan Agreement, Sales One and Sales Two jointly borrowed the sum of $1,537,800 from NBofC. Utilizing these loan proceeds, Sales One acquired all of First Huntington's Persingers shares at a price of $220 per share. As a consequence Sales One, which is wholly owned by Carmazzi, acquired (including the 40 shares of Persingers stock already owned by it) 52.45% of the issued and outstanding stock of Persingers.

26. Persingers requested Coopers & Lybrand to update its appraisal of the fair market value of a minority stock interest in Persingers. On or after

March 27, 1987, Persingers received the updated Coopers & Lybrand appraisal, the purpose of which was corporate planning, which determined that the shares constituting a minority interest in Persingers had a fair market value as of February 28, 1987, of $222 per share.

27. Thereafter, Carmazzi, through Sales One and Sales Two, proposed to Persingers a merger agreement under which (a) Sales Two would be merged with and into Persingers, which would be the surviving corporation, and (b) each of the common shares of Persingers outstanding before consummation of the merger, other than the stock of Persingers owned by Sales One, would be converted into the right to receive $222 in cash.

28. On April 18, 1987, a notice was mailed to all Persingers directors informing them that a meeting would be held on April 27, 1987, to consider the Sales One and Sales Two offer. The notice was accompanied by a copy of the proposed merger agreement and a draft of the proxy statement to be sent to Persingers shareholders.

29. A directors' meeting was then held on April 27, 1987, at which time the resignation of Agee as a director of Persingers was accepted and William A. Tantlinger, a friend of Carmazzi, was elected to succeed Agee as a director of Persingers.

30. Between April 17 and April 27, 1987, Carmazzi, Wiles, Morton, and Tantlinger met with Charles B. Stacy and David B. Shapiro, corporate counsel to

Persingers, and discussed the merger proposal. These meetings were requested by those individuals to seek guidance on the merger. Thomas Persinger did not attend these meetings.

31. At the meeting of the Persingers Board of Directors held on April 27, 1987, the Board considered the merger agreement proposed by Sales One and Sales Two. At this 13-hour meeting, a majority of the directors of Persingers, with Carmazzi abstaining and Thomas Persinger dissenting, voted to recommend this merger to the shareholders of Persingers. The minutes of this directors meeting reflect that the directors, in approving the merger, took into consideration the economic outlook and prospects for Persingers' business and its shareholders, the alternatives of

liquidation, sale to an ESOP or a business or person other than Carmazzi, the book value analysis presented to the meeting by Thomas Persinger, and the valuation reports prepared by Coopers & Lybrand. It was noted that the Coopers & Lybrand reports had been prepared for general corporate purposes, did not take into account any proposed transaction, and did not constitute a fairness opinion. The Board determined that a fairness opinion was not necessary. After extensive discussion, the Board of Directors of Persingers approved the merger agreement and determined to submit it to the shareholders of Persingers for their consideration.

32. On April 28, 1987, Persingers mailed a notice of a special shareholders' meeting called for May 19,

1987. The purpose of the meeting was to consider and act upon the merger of Persingers and Sales Two. The notice of the meeting was accompanied by a proxy statement that described, among other things, the transaction and the dissenters' rights of the shareholders. The proxy statement included as an appendix the two appraisal reports of Coopers & Lybrand.

33. By letter dated May 5, 1987, to Carmazzi as President of Persingers, Southeast Bank, N.A. (Southeast), the trustee of the estate of a deceased shareholder, expressed its opinion that the $222 per share cash offer for its Persingers shares appeared to be low and indicated its desire to talk with Carmazzi about receiving a higher value for its shares.

34. On May 11, 1987, Southeast, as Trustee under the Will of B. R. Williamson, deceased, the owner of 636 shares of the stock of Persingers (5.92% of the corporation's outstanding stock), and Joseph M. Persinger instituted this present action on behalf of themselves and all other shareholders against Carmazzi, Wiles, Morton, Tantlinger, Sales One, Sales Two and Persingers; by amended complaint, Agee and First Huntington were added as defendants.

35. In their complaint, plaintiffs sought to enjoin the merger of Sales Two into Persingers and claimed damages against the directors. The district court refused to issue a temporary restraining order.

36. The meeting of the shareholders of Persingers called for May 19, 1987, was adjourned until May 29, 1987.

37. On May 21, 1987, Joseph M. Persinger, by counsel, offered to purchase: (1) all shares held by the defendants in this civil action, including the John A. Persinger bloc purchased by Carmazzi and Sales One from First Huntington, for a cash price of $300 per share; and (2) to purchase from all other shareholders all shares that they wished to sell for a cash price of $300 per share. This offer was subject to two conditions: (1) that all of the defendants in this civil action would sell all of their shares to Joseph M. Persinger, and (2) that Joseph M. Persinger could obtain financing for his offer in the amount of $1,800,000 by noon

on Tuesday, May 26, 1987. This offer was rejected by Carmazzi and Sales One on May 21, 1987. This offer was disclosed to the shareholders of Persingers.

38. On May 21, 1987, Sales One offered to sell its 5,592 shares of Persingers acquired from First Huntington to Persingers for a price of $275 per share. A meeting of the directors of Persingers was called by Wiles and Morton for May 27, 1987, to consider the Sales One offer.

39. On May 26, 1987, Joseph M. Persinger, 1866 Holdings, Inc., a Delaware corporation owned by Joseph M. Persinger, and other members of the Meredith Persinger Group offered to purchase the shares offered to Persingers by Sales One on May 21, 1987, for $285 per share. Subject to the condition that

closing of the purchase and sale to Joseph M. Persinger and 1866 Holdings, Inc., of the said 5,592 shares from Persingers took place, Joseph M. Persinger and 1866 Holdings, Inc., stated they would make a tender offer to all shareholders of Persingers to purchase their shares for $300 per share.

40. On May 27, 1987, Sales One amended its offer to sell its 5,592 shares to Persingers, conditioning that offer to prevent the resale of said shares to any member of or entity representing the Persinger Group.

41. At the directors' meeting held on May 27, 1987, Wiles, Morton and Tantlinger, constituting a majority of the directors of Persingers, rejected the offer of Sales One to sell its 5,592 shares of Persingers. Because the

directors determined to reject the Sales One offer, they did not consider the Joseph M. Persinger offer, which was conditioned upon purchase by Persingers of its stock offered by Sales One.

42. On May 29, 1987, at the reconvened meeting of shareholders, the shareholders of Persingers voted to approve the merger of Sales Two into Persingers. Of the outstanding 10,738 shares of Persingers, holders of 68% thereof, or 7,302 shares, voted in favor of the merger, and holders of 31% thereof, or 3,328 shares, voted against the merger.

43. On or before the vote on the merger was taken, Southeast, Joseph M. Persinger and all other members of the Persinger Group filed their written objection to the proposed merger. At the

meeting, the plaintiffs in this action and all other members of the Persinger Group voted against the merger. The plaintiffs and all other members of the Persinger Group have dissented from the Merger.

44. On May 29, 1987, the merger of Sales Two with and into Persingers was consummated.

45. As a result of the merger, Persingers is indebted to NBofC for the prior indebtedness of defendants Carmazzi and Sales One in an amount up to $1,800,000, and NBofC has security interest in all of the assets of Persingers to secure the indebtedness in an amount up to $1,800,000.

46. As a result of the merger, the shares of Southeast, Joseph M. Persinger, and all other minority shareholders, have

been converted to the right to receive $222 per share. Carmazzi and Sales One (wholly owned by him) are the sole shareholders of Persingers, holding all of its shareholders' equity, approximately $1,100,000 at book value.

II. QUESTIONS OF LAW TO BE ANSWERED

1. Did West Virginia law require advance notice that a vote to repeal Bylaw § 5.4 would be considered at the annual shareholders meeting held on March 9, 1987?

2. Do the facts state a claim under West Virginia law that the defendants or any of them breached any fiduciary duties they owed to Persingers' minority shareholders?

3. If the answer to either 1 or 2 is yes, is the remedy of the minority shareholders limited to the statutory

valuation procedure under W. Va. Code § 31-1-123?

4. If the answer to 3 is no, what additional remedies do the minority shareholders have under West Virginia law?

Entered at the direction of Judge Hall with the concurrences of Judge Russell and Judge Murnaghan.

/s/ Bert M.Montague
Clerk

ENTERED: JUNE 22, 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

SOUTHEAST BANK, N.A., et al.

Plaintiffs,

vs. CIVIL ACTION NO. 2:87-0462

R. FRANK CARMAZZI, et al.

Defendants.

MEMORANDUM OPINION AND ORDER

Pending are cross motions for summary judgment. The Court GRANTS the Defendants' motions for summary judgment and holds that the Plaintiffs' only remedy is statutory valuation.

Under *Rule* 56(e), Federal Rules of Civil Procedure, summary judgment is proper only:

> "[I]f the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

> material fact and that the moving party is entitled to summary judgment as a matter of law.

A principal purpose of summary judgment is to isolate and dispose of meritless litigation. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). The party moving for summary judgment has the burden to show initially the absence of a genuine issue concerning any material fact. Adickes v. S. H. Kress & Co., 398 U.S. 144, 159 (1970). However, once the moving party has met its initial burden, the burden shifts to the nonmoving party to "establish the existence of an element essential to that party's case, and from which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. at 322. To discharge this burden, the nonmoving party cannot rely on its pleadings, but instead must

have evidence showing that there is genuine issue for trial. *Id.* at 324. As will become apparent, the Court concludes summary judgment is appropriate.

Facts

The Plaintiffs are former minority shareholders of Persingers, Inc. (PI), a West Virginia corporation. Frequently referred to as the "Meredith Persinger Group," the Plaintiffs previously held approximately 16% of the outstanding stock of PI. PI is engaged in the business of selling mining and industrial machinery, tools, parts and supplies.

For many years, Meredith Persinger served as president of PI. At the annual directors meeting of March 2, 1985, Meredith Persinger was removed as president of PI and Defendant R. Frank Carmazzi was installed as the new

president. Instrumental in ousting Meredith Persinger and installing Carmazzi as the president was John A. Persinger, who then owned roughly 48% of PI's stock. John A. Persinger, a nephew of Meredith Persinger, never took an active role in the management of PI.

A short time after the March 2, 1985, annual directors meeting John A. Persinger died. First Huntington National Bank was named as executor of the decedent's estate. On September 17, 1985, William F. Agee was elected as a member of PI's board representing the interests of the John Persinger Estate. During this period Carmazzi owned only a nominal percentage of PI's shares.

Meredith Persinger, aided by his son, Thomas, thereafter attempted to purchase the PI shares held by First

Huntington. Between June, 1985 and January, 1987, First Huntington rebuffed numerous attempts by Meredith Persinger to purchase the stock. First Huntington's final response to Meredith Persinger was an offer to sell the approximately 48% stock holdings for $275.00 a share. Meredith Persinger rejected this counter offer.

During the latter part of 1986, Defendants Carmazzi, W. Guy Wiles, Jr. (Wiles) and John C. Morton (Morton) also discussed with Agee the purchase of the 48% block of stock. In early 1987 Carmazzi, Wiles and Morton executed a letter of intent with Agee to purchase the 48% block of John A. Persinger shares at $275.00 per share, subject to obtaining financing for the purchase. Wiles and Morton eventually withdrew,

leaving Carmazzi who pursued financing with the National Bank of Commerce of Charleston, West Virginia.

On February 16, 1987, a notice was sent to the PI shareholders noticing the annual meeting to be held on March 7, 1987. At the annual meeting, Defendant Morton moved, seconded by Defendant Agee, that PI's by-law section 5.4 be repealed. Section 5.4 in relevant part provided as follows:

> ** * * (d) No officer or director of this corporation shall purchase any shares of the capital stock of this corporation from any other shareholder unless the corporation shall first have the opportunity, after notice to and authorization by the Board of Directors, to purchase such shares at the same price and upon equivalent terms, and the Board of Directors shall determine that it is not in the best interests of the corporation at such time to purchase such shares at such price and on such terms.
>
> (e) Any officer or director of this corporation who negotiates with

> any shareholder of the corporation for the purchase of any shares of the capital stock of the corporation shall be deemed to be negotiating on behalf of the corporation, but shall not have the power to bind the corporation in the absence of specific authorization by the board of directors; and any officer or director who shall purchase any shares of the capital stock of this corporation without complying with this section 5.4 shall be conclusively deemed to have purchased such shares on behalf of the corporation, and upon tender by the corporation of the purchase price of such shares shall, upon approval of such purchase on bhealf of the corporation by the board of directors, forthwith deliver the certificate or certificates representing the same to the corporation. . . ."

By a 69% majority, the shareholders voted in favor of repealing section 5.4

Thomas Persinger, on behalf of the Meredith Persinger Group, opposed the repeal of section 5.4. He argued and voted against the repeal motion. Defendants Carmazzi, Morton, Wiles and Agee voted their shares and management

proxies in favor of the repeal of section 5.4

At the same annual meeting, the directors voted to redeem at $220.00 a share all unsolicited requests for redemption. 872 shares of PI's stock were redeemed by the corporation.

On this same date of March 7, 1987, following the repeal of section 5.4, Carmazzi entered into a letter of intent with First Huntington to purchase the John A. Persinger Estate stock at $275.00 per share. Under the agreement, Carmazzi enjoyed the exclusive right to purchase the shares for a period of 45 days while he obtained financing. On April 17, 1987, Carmazzi closed a loan with the National Bank of Commerce and acting through his corporation, Sales One, he purchased the John A. Persinger block of

stock from First Huntington. Defendant Agree resigned as a director of PI following the stock transfer.

On the next day Morton and Wiles called a special board of directors meeting of PI for April 27, 1987. The purposes of the meeting were (1) to select a new director and (2) to consider and vote on a plan of merger between Sales Two (another corporation owned by Carmazzi) and PI. At the directors meeting, William Tantlinger, a friend of Carmazzi, was elected to fill the vacancy on the board resulting from Agee's resignation. The directors, including Tantlinger, Morton, Wiles and Thomas Persinger, considered the proposed merger. After extensive discussion, the board voted, with Thomas Persinger dissenting, to recommend to the

shareholders of PI that the proposed merger be consummated.

On April 28, 1987, PI mailed to its shareholders a notice of special shareholders meeting on May 19, 1987. The meeting was continued to May 29, 1987, due to a pending motion for a temporary restraining order. On May 29, 1987, the shareholders of PI voted to approve the merger of Sales Two into PI.[1] A 69% majority voted in favor of the

---

[1] To implement the merger, Carmazzi caused Sales One, Inc., a West Virginia corporation, to be formed. He contributed his 40 shares of PI stock plus $1,000, receiving in exchange all of the outstanding stock of Sales One. Sales One caused the formation of Sales Two, a West Virginia corporation, as a wholly owned subsidiary of Sales One. The John A. Persinger block of shares was held by Sales One. Under the merger, Sales Two was merged into PI and all shares of stock, with the exception of the shares held by Sales One, were "cashed out."

merger. The merger was ultimately consummated with each shareholder being "cashed out" at a price of $222.00 per share.

Repeal of Section 5.4

Plaintiffs assert that the Defendants' actions in repealing section 5.4 violated West Virginia law. Under West Virginia law, officers and directors of a corporation occupy the position of fiduciary to the shareholders. Bailey v. Vaughn, 359 S.E.2d 599, 605 (W.Va. 1987); Meadows v. Bradshaw Diehl Co., 139 W.Va. 569, 580, 81 S.E.2d 63, 69 (1954). Majority shareholders also owe a fiduciary duty to the minority shareholders. Masinter v. Webbco Co., 262 S.E.2d 433 (W. Va. 1980); Meadows v. Bradshaw Diehl Co., supra. However, at a shareholders meeting each shareholder,

even a director shareholder, represents himself and his own interests and in no sense acts as a fiduciary for the other shareholders minority or majority. Thurmond v. Paragon Colliery Co., 82 W.Va. 49, 95 S.E. 816, 817 (1918); Cyclopedia of the Law of Private Corporations, §2031, P. 181 (Perm. Ed. 1987). Based upon these standards, the issue is whether the Defendants breached any duties owed to the minority shareholders.

Under the West Virginia Corporation Act:

> "Written notice stating the place, day and hour of the meeting, and, in the case of a special meeting, the purpose of [sic] purposes for which the meeting is called, shall be delivered ... to each shareholder of record ... ."

PI's by-laws contain an identical provision.

Under this provision, no advance notice of matters to be addressed at the annual meeting is required. There are four generally recognized exceptions to the general rule that no advance notice is required. Notice must be given when shareholders will be required to vote on amendment of articles of incorporation, merger, sale of assets or dissolution. The West Virginia Corporation Act recognizes these exceptions. W. Va. Code, §31-1-107, 117, 121, 126. Likewise, under the West Virginia Corporation Act, notice need not be provided to shareholders prior to consideration or proposed by-law amendment at an annual meeting. W. Va. Code, §31-1-17.

Based upon PI's by-laws and the West Virginia Corporation Act, the Court

concludes that the Defendants were under no duty to provide advance notice of the upcoming vote to repeal section 5.4 at the annual meeting. The Defendants' actions were consistent with recognized corporate practice and within the scope of the fiduciary duties owed to the minority shareholders. The Court is unpersuaded by Plaintiffs' argument that the repeal of section 5.4 involved the type of fundamental corporate change such that shareholders must be notified prior to the annual meeting.

Moreover, the minority shareholders attended the March 7, 1987, annual meeting and voted shares against the repeal of section 5.4. Plaintiffs had their opportunity to convince the shareholders to vote against the repeal. Plaintiffs were simply outvoted and

cannot now complain when the shareholders overwhelmingly voted against Plaintiffs' position. See Germer v. Triple-State Natural Gas and Oil Co., 60 W. Va. 143, 54 S.E. 509 (1906). The Defendant shareholders did not breach any duties owed to the Plaintiffs by voting their shares in favor of the repeal of section 5.4 even though Defendants had a personal interest in the outcome. Thurmond v. Paragon Colliery Co., supra.

Redemption of Shares

As further evidence in support of Plaintiffs' claim that Defendants breached their fiduciary duties, Plaintiffs' identify the redemption of 832 shares at the March 7, 1987, board meeting. It is uncontroverted, however, that the redemption was not orchestrated by the Defendants but rather stemmed from

the desire of individual shareholders to withdraw from ownership of PI. Pursuant to the by-laws of PI, the board of directors was authorized to redeem stock and the board did so pursuant to that authority. Accordingly, the Court concludes that the Defendants did not breach any fiduciary duties owed to the minority shareholders when redeeming outstanding stock.

Section 10(b)(5) and Rule 10(b)(5)

Plaintiffs contend that they are entitled to relief under an implied private cause of action for violation of Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78(j)(b) and *Rule* 10(b)(5) of the Securities and Exchange Commission. Plaintiffs assert that the Defendants engaged in manipulation and deception in

the merger between Sales Two and PI. The allegations that support this theory are essentially the same allegations in support of the Plaintiff's asserted cause of action for breach of fiduciary duties.

The linchpin of Plaintiffs' 10(b)(5) claim is that Carmazzi at the time of the merger, was not a lawful holder of the obtained shares of stock. The Court concludes otherwise. Carmazzi, who then owned approximately 52% of PI's stock, did not need the approval of the minority in order to consummate the merger. Accordingly, causation is broken and the Plaintiffs' asserted 10(b)(5) claim must fail. Virginia Bank Shares, Inc. v. Sandberg, 111 S.Ct. 2479 (1990).

Conclusion

The Court concludes that the Plaintiffs have failed to demonstrate a genuine issue of material fact as to any 10(b)(5) violation or breach of fiduciary duty by the Defendants. The Court further concludes that the Plaintiffs' asserted causes of action based upon conspiracy, fraud and conversion have been abandoned and there is no evidence to support these claims.

The minority shareholders nevertheless are entitled to pursue their remedies under statutory valuation. Since statutory valuation is a state remedy of recent origin and because there is an action in the state court pending for this purpose, the Court chooses to abstain from addressing issues which may involve matters of first impression and

important state policy. Accordingly, the court ORDERS this action dismissed without prejudice to the valuation issue, and stricken from the docket.

In light of this Memorandum Opinion and Order, the companion cases of Meredith T. Persinger, et al vs. R. Frank Carmazzi, et al, Civil No. 2:89-0410, and Margaret R. McCartney, et al vs. R. Frank Carmazzi, et al, Civil No. 2:89-0411, need not be addressed since they raise identical issues. Accordingly, the Court ORDERS the companion cases dismissed and stricken from the docket of the Court.

The Clerk is directed to send a copy of this Memorandum Opinion and Order to counsel of record.

ENTER: June 22, 1992

/s/ Charles H. Haden, II
Chief Judge

ENTERED: JUNE 22, 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

SOUTHEAST BANK, N.A., et al,

Plaintiffs,

vs. CIVIL ACTION NO. 2:87-0462

R. FRANK CARMAZZI, et al,

Defendants.

JUDGMENT ORDER

In accordance with the Memorandum Opinion and Order entered this date, the Court ORDERS as follows:

1. That the Defendants' motions for summary judgment are granted as molded;

2. That the Plaintiffs' motions for summary judgment are denied;

3. That this action is dismissed and stricken from the docket of the Court; and

4. That the case is dismissed without prejudice on the issue of statutory valuation of the shareholders interests.

The Clerk is directed to send a copy of this Order to counsel of record.

ENTER: June 22, 1992

/s/ Charles H. Haden, II
Chief Judge

ENTERED: JUNE 22, 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

MEREDITH T. PERSINGER, et al,

Plaintiffs,

vs. CIVIL ACTION NO. 2:89-0410

R. FRANK CARMAZZI, et al,

Defendants.

JUDGMENT ORDER

In accordance with the Memorandum Opinion and Order entered in the case of Southeast Bank, et al v. R. Frank Carmazzi, et al, Civil No. 2:87-0462, entered even date herewith, the Court ORDERS as follows:

1. That the issues raised in Plaintiffs' complaint have been resolved in the lead civil action styled Southeast Bank, et al v. R. Frank Carmazzi, et al, Civil No. 2:87-0462; and

2. That this action is dismissed and stricken from the docket of the Court.

The Clerk is directed to send a copy of this Order to counsel of record.

ENTER: June 22, 1992

/s/ Charles H. Haden, II
Chief Judge

ENTERED: JUNE 22, 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

MARGARET R. McCARTNEY, et al,

Plaintiffs,

vs. CIVIL ACTION NO. 2:89-0411

R. FRANK CARMAZZI, et al,

Defendants.

JUDGMENT ORDER

In accordance with the Memorandum Opinion and Order entered in the case of Southeast Bank, et al v. R. Frank Carmazzi, et al, Civil No. 2:87-0462, entered even date herewith, the Court ORDERS as follows:

1. That the issues raised in Plaintiffs' complaint have been resolved in the lead civil action styled Southeast Bank, et al v. R. Frank Carmazzi, et al, Civil No. 2:87-0462; and

2. That this action is dismissed and stricken from the docket of the Court.

The Clerk is directed to send a copy of this Order to counsel of record.

ENTER: June 22, 1992

/s/ Charles H. Haden, II
Chief Judge

ENTERED: JUNE 1, 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

KENNETH T. WILLIAMSON, et al,

Plaintiffs,

VS. CIVIL ACTION NO. 2:87-0462

R. FRANK CARMAZZI, et al,

Defendants.

O R D E R

It is hereby ORDERED that the trial of this action is continued to Tuesday, July 21, 1992. It is further ORDERED that the final settlement conference is continued to 10:00 a.m. on Monday, July 20, 1992.

The Clerk is directed to send a copy of this Order to counsel of record.

ENTER: June 1, 1992

/s/Charles H. Haddon, II
Chief Judge

ENTERED: JUNE 1, 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

KENNETH T. WILLIAMSON, CAROL PRESTON WILLIAMSON and JOSEPH M. PERSINGER, on behalf of themselves and all other shareholders of Persingers Incorporated,

Plaintiffs,

v. CIVIL ACTION NO. 2:87-0462

R. FRANK CARMAZZI, SALES ONE, INC., SALES TWO, INC., JOHN C. MORTON, W. GUY WILES, JR., WILLIAM A. TANTLINGER, ESQ., PERSINGERS INCORPORATED, WILLIAM F. AGEE and FIRST HUNTINGTON NATIONAL BANK, N.A.,

Defendants.

PRETRIAL ORDER

In accordance with the Local Rules of this Court and Rule 16, F. R., Civ. P., the parties, by counsel and by direction of the Court, certify that the matters and statements hereinafter set out, except as amended by the Court, or

by the parties for good cause shown, shall determine the issues of law and the course of the trial of the above-styled case.

1. A brief statement, for each party, of the basis of jurisdiction.

STATEMENT OF PLAINTIFFS:

This Court has jurisdiction over this action by virtue of the diversity of citizenship provisions in 28 U.S.C. §§ 1331 and 1332(a) et seq. and by virtue of the provisions of 15 U.S.C. 78(a) et seq.

STATEMENT OF DEFENDANTS CARMAZZI, SALES ONE, INC., SALES TWO, INC., MORTON, WILES, TANTLINGER, PERSINGERS INCORPORATED and AGEE

These defendants[1] admit that this Court does have jurisdiction of this action by virtue of 28 U.S.C. § 1332. These defendants deny that there is federal question jurisdiction and deny that 15 U.S.C. § 78(a) provides a basis of jurisdiction in this action. These defendants would note that on October 14, 1988, they filed a motion for partial summary judgment together with a memorandum seeking dismissal of the federal securities claim set forth in the amended complaint. Further plaintiffs

---

[1] As used herein, the term "these defendants" refer to R. Frank Carmazzi, Sales One, Inc., Sales Two, Inc., John C. Morton, W. Guy Wiles, Jr., William A. Tantlinger, Esq., Persingers Incorporated and William F. Agee.

have not pursued any federal securities claim in subsequent proceedings before this Court.

STATEMENT OF DEFENDANT FIRST HUNTINGTON

The Complaint in this action contains multiple counts. All counts except for Count VII base jurisdiction on 28 U.S.C. § 1332, diversity of citizenship. Count VII is based on the Federal Securities and Exchange Act of 1934, 15 U.S.C. 78(a). Defendant, The First Huntington National Bank (First Huntington) objects to jurisdiction based upon the Securities and Exchange Act. First Huntington states that no valid cause of action exists under the Act.

2. Contested issues of law requiring court ruling before commencement of trial.

STATEMENT OF PLAINTIFFS

The issues to be listed under this paragraph are set forth in plaintiffs' motion for summary judgment filed on April 20, 1992. Reference is made to plaintiffs' motion for summary judgment for a listing of those issues.

STATEMENT OF DEFENDANTS CARMAZZI, SALES ONE, INC., SALES TWO, INC., MORTON, WILES, TANTLINGER, PERSINGERS INCORPORATED and AGEE

These defendants maintain that there are several issues which this Court must rule upon prior to trial of this action, including the following:

1. The motion for partial summary judgment filed by these defendants on October 14, 1988.

2. The motion for summary judgment filed by these defendants on April 20, 1992.

3. The first amended complaint contains nine counts. Counts I and II seek injunctive relief. These Counts are within the equity jurisdiction of this Court. There would be no jury trial on these counts. The remaining counts of the first amended complaint seek monetary damages, except for Count VIII thereof, which is a claim under the West Virginia Corporation Act. It now appears that the sole relief sought by plaintiffs is rescission of the merger which forms part of the transaction complained of. These defendants are uncertain as to whether or not plaintiffs have abandoned the claims set forth in their amended complaint and now seek only rescission or whether these defendants will have to defend each and every count of the nine count complaint. These defendants maintain that should

plaintiffs seek rescission, such an action would require trial to the Court. These defendants seek clarification from the Court on the question of whether the trial herein will be to the Court or to a jury.

STATEMENT OF DEFENDANT FIRST HUNTINGTON

Defendant First Huntington is unable to discern plaintiffs' position on the issued. Plaintiffs' statement that the issues are "set forth in plaintiffs' motion for summary judgment filed on April 20, 1992" offers no help and serves only to obfuscate the issues because that motion does not delineate the legal issues and only speaks in terms of a vague "fiduciary duty" without stating what plaintiffs' position is at present regarding the other causes of action asserted in their Complaint.

Accordingly, First Huntington sets forth its version of the unresolved and contested issues of law that need to be ruled on before trial:

1. Is notice required of the matters to be taken up at an annual meeting of a corporation under West Virginia law?
2. Is a cash out merger lawful under West Virginia corporate law?
3. Is the sole remedy for plaintiffs the appraisal and evaluation procedure set forth under § 31-1-123 of the West Virginia Corporation Act, sometimes known as The West Virginia Dissenters Rights Statute?

4. Did First Huntington have the right to vote its shares for repeal of Bylaw §5.4?

5. Did First Huntington have a duty to disclose the purpose and intended effect of repeal of Bylaw §5.4?

6. Did plaintiffs waive any notice requirement by their proxy participating at and voting plaintiffs' stock at the Annual Meeting of Shareholders?

7. Have plaintiffs abandoned or waived their rights to all causes of action and claims for damages set forth in their Complaint except for violations of fiduciary duty and rescission as a result of plaintiffs' complete and

absolute failure to mention any other cause of action or request for damages in this pretrial order other than the claim for breach of fiduciary duty and the remedy of rescission?

8. If plaintiffs' Section 10b and Rule 10(b)(5) cause of action asserted in the complaint has not been abandoned is it barred by the statute of limitations?

9. Is reliance upon advice of counsel a defense to an allegation of breach of fiduciary duty?

10. What is the nature of the remedy of rescission requested by plaintiffs and how will that remedy be applied in this case?

3. A realistic and brief statement by third-party plaintiff(s) of essential elements which must be proved to establish any meritorious cause of action remaining for adjudication and the measure of damages or relief applicable thereto; and by counsel for defendant(s) and/or third-party defendant(s) of essential elements which must be proved to establish any meritorious defense(s), accompanied by legal authorities supporting such statements. This directive likewise contemplates corresponding statements in regard to counterclaims and cross-claims.

STATEMENT OF PLAINTIFFS

Basically, this case involves the tale of how the President of a small closely held West Virginia corporation, aided and abetted by the officers and

directors, goes from owning less than 1% of the stock of the corporation to owning 100% of the stock in a few short months utilizing the phenomenon of a leveraged buy-out followed by a "squeeze out" merger whereby all the shareholders of the corporation save the President are thrown out at a dictated price of $222 per share. In the process, the President tampers with the bylaws of the corporation and utilizes the funds of the corporation to further his LBO plans, all the while actively concealing these acts from the unsuspecting minority shareholders. In short, this case is about unadulterated greed and about how greed clouds judgment.

The plaintiffs are minority shareholders of Persingers. The individual defendants were each directors

of Persingers. The defendant Sales One, Inc. (Sales One) and Sales Two, Inc. (Sales Two) were shell corporations formed by defendant Carmazzi, who was also the President of Persingers, to facilitate his leveraged buy-out of Persingers. Defendant Agee was a director of Persingers by virtue of his position of Senior Vice President of First Huntington National Bank, N.A. ("First Huntington"). First Huntington, as Trustee, was a 48% shareholder of Persingers.

Plaintiffs must prove that defendants' actions which enabled the challenged merger to occur, were unlawful and that the ensuing mergers was likewise unlawful. Plaintiffs will also prove that the material transmitted to the shareholders regarding the proposed

merger were false and misleading. Plaintiffs seek rescission of the challenged merger.

STATEMENT OF DEFENDANTS CARMAZZI, SALES ONE, INC., SALES TWO, INC., MORTON, WILES, TANTLINGER, PERSINGERS INCORPORATED and AGEE

From reviewing the proposed pretrial order of plaintiffs, it appears that the only remedy being sought in this action is for rescission. Plaintiffs do not set forth any other type of remedy in their portion of the pretrial order and never describe therein the "essential elements which must be proved" of the causes of action they might pursue.

The merger, which plaintiffs seek to rescind, has been effected. The circumstances of the shareholders, the parties and the corporation have changed because the District Court denied plaintiffs' motion for a temporary

restraining order five years ago and permitted the merger to go forward. Almost five years later, it is a practical impossibility to impose a sensible unraveling of the merged corporation. The status quo cannot be restored because most of the former shareholders of Persingers Incorporated are not before this Court and cannot be required to participate in the rescission. Under such circumstances, if a remedy is appropriate, that remedy is for statutory evaluation. W.Va. § 31-1-123

Plaintiffs have not set forth any cause of action in the pretrial order and have only set forth a remedy, that is, rescission. These defendants have an affirmative defense to each and every count of the first amended complaint. In

essence, these defendants committed no fraud, breached no fiduciary duties, breached no statutory duties and adhered to the letter and the spirit of applicable corporate laws.

STATEMENT OF DEFENDANT FIRST HUNTINGTON

Defendant First Huntington does not agree with plaintiffs' so-called statement of essential elements which must be proven. Here, as in other sections of this Order, plaintiffs have refused to straightforwardly put forth the issues, choosing instead to hide behind the waste basket allegations that defendants' actions were "unlawful." Apparently, plaintiffs now assert only one cause of action - violation of fiduciary duty - but they do not discuss the elements of proof required of them. They appear to have abandoned any claims

for fraud, conspiracy, conversion or violation of Section 10b of the Securities Act as originally alleged in the Complaint. Likewise, they appear to seek no damages and limit themselves to rescission as their only remedy.

It is First Huntington's position that for plaintiffs to establish a cause of action for breach of fiduciary duty, they must (1) delineate and prove a precise duty which existed under each circumstance complained of; (2) that each particular duty alleged was breached by The First Huntington; (3) that plaintiffs were damaged; and (4) that the damage had a causal connection under law to the breach that occurred and was not speculative in any way. First Huntington strongly denies that it had such a duty under the circumstances alleged or that

it violated that duty or that any real damage was caused by plaintiffs by it.

First Huntington maintains that the sole and exclusive remedy for plaintiffs exists in the West Virginia Corporation Action § 31-1-123, also know as The West Virginia Dissenters Right Statute.

First Huntington states that as to plaintiffs sole claim set-out in the Pre-Trial Order its defenses are:

(1) Plaintiff's were not forced by First Huntington to accept the terms of a "cash-out merger;"

(2) Bylaw 5.4 did not preclude First Huntington from selling stock to a director or officer;

(3) Neither First Huntington, nor Agee, were under a duty to police bylaw 5.4;

(4) The defendants controlled 55% of Persingers stock at the annual meeting without proxies and defendants could not prevent repeal of Bylaw §5.4;

(5) The National Bank of Commerce required 100% stock ownership of Carmazzi not just 50%. Therefore the stock redemptions were of no consequence;

(6) The defendants controlled approximately 55% of Persingers stock prior to any redemption. Therefore any redemption had no causal connection to damage, if any, of plaintiffs;

(7) Plaintiffs vote at the Annual Meeting would not have changed whether or not notice had been given;

(8) Plaintiffs by having their vote cast at the annual meeting by proxy and cast against repeal of Bylaw 5.4 have waived any notice deficiency;

(9) First Huntington had the absolute right to vote the stock it held for repeal of Section 5.4;

(10) Neither Agee, nor First Huntington, prior to the day of the Annual Meeting was aware that Bylaw 5.4 was to be repealed or that a redemption was to occur;

(11) First Huntington and Agee had the absolute right to rely on the advice of counsel as to whether notice need be given for the bylaw repeal;

(12) First Huntington did not conceal either the repeal of bylaw 5.4 or the redemption of stock;

(13) The Plaintiffs agent and proxy, Tom Persinger, knew about the repeal of Bylaw 5.4 and the stock redemption and reported back to plaintiffs;

(14) Even if plaintiffs would have been advised of each and every action to which they complain, the defendants controlled enough stock to support all action taken and plaintiffs were without enough stock support to challenge the actions of defendants; and

(15) Notice of a bylaw repeal need not be given at an Annual Meeting.

4. In all cases, for each party, a brief summary of the material facts and theory of liability or defense.

STATEMENT OF PLAINTIFFS

Plaintiffs filed an extensive brief in support of their motion for summary judgment and, for sake of brevity, reference should be made to that brief for a more detailed statement of plaintiffs' claims. Nonetheless, plaintiffs contend that certain acts of defendants Directors constituted breaches of fiduciary duties. The particular acts of the defendants to be assessed under the fiduciary duty standards are: (1) the deliberate failure to advise unsuspecting shareholders that repeal of

By-law Section 5.4 was going to be placed on the agenda at the March 7, 1987 annual meeting; (2) the deliberate concealment from the shareholders that By-law Section 5.4 had been repealed; (3) the deliberate failure to disclose to the shareholders that the purpose and intended effect of the repeal was to facilitate defendant Carmazzi's plan to purchase 5,592 shares of Persingers stock which he had negotiated with defendant Agee; (4) deliberately concealing from the unsuspecting shareholders the selective redemption of the 832 shares of Persinger stock and the use of corporate funds to accomplish the same; (5) the solicitation of proxies from unsuspecting shareholders without disclosure of the above happenings and the subsequent voting of those proxies from uninformed

shareholders; (6) the failure of the defendant Directors to properly consider the offer of Joseph M. Persinger that would have resulted in the minority shareholders receiving $78 per share more than received under defendant Carmazzi's "squeeze out" merger; (7) the failure of defendant Directors to disclose to the shareholders before, during or after the March 7, 1987 Annual Meeting of the purpose and intended effect of the aforesaid selective redemption; (8) the dissemination of false and misleading materials in connection with the challenged merger; and (9) the failure of defendant Directors to properly exercise their fiduciary duties in all respects concerning the "enabling" steps that laid the foundation for the unlawful merger and in the merger itself.

Under West Virginia law, it is clear that officers and directors of a corporation occupy the position of fiduciary for the shareholders. Bailey vs. Vaughan, 359 S.E.2d 599, 605 (W.Va., 1987); Meadows vs. Bradshaw Diehl Co., 139 W.Va. 569, 580, 81 S.E.2d 63, 69 (1954). It is equally well settled under West Virginia law that the owners of the majority of shares of a corporation owe a fiduciary duty to the minority shareholders. Masinter vs. Webco Co., 262 S.E.2d 433 (W.Va. 1980); Meadows vs. Bradshaw Diehl Co., supra. Thus, officers, directors and minority shareholders are required under West Virginia law to comply with the standards of good faith and fair dealing and a failure to do so results in a violation of the fiduciary relationship with the

shareholders. Masinter vs. Webco Co., supra, in Syllabus Point 3.

The propriety of the actions of defendants in literally ambushing the shareholders in the repeal of By-law Section 5.4 must therefore be assessed in light of their fiduciary relationship that required them to adhere "to the standards of common decency and honesty." Pepper vs. Litton, 308 U.S. 295, 84 L.Ed. 327, 670 S.Ct. 283 (1939). Defendant Directors' acts clearly failed to meet that standard; rather, defendant Directors adhered to standards of concealment and self enrichment.

Some of the plaintiffs' authorities for their position that rescission is appropriate and required are as follows:

Bank of Mill Creek v. Elk Horn Coal Corp., 133 W.Va. 639, 658, 57, S.E.2d

263, 248 (1950); Tierney vs. United Pocahontas Coal Corp., 85 W.Va. 545, 102, S.E. 249 (1920); Bailey vs. Vaughan, supra; Coggins vs. New England Patriots Football Club, 492 N.E.2d 1112, 1119 (Mass. 1986); Stauffacher vs. Checota, 441 N.W.2d 755, N.5 (Wisc. Ct. App. 1989); Lewis vs. Clark, 911 F.2d 1558 (11th Cir. 1990); bryan vs. Brock & Blevins Co., 490 F.2d 563 (5th Cir. 1974), cert denied, 419 U.S. 844 (1974).

STATEMENT OF DEFENDANTS CARMAZZI, SALES ONE, INC., SALES TWO, INC., MORTON, WILES, TANTLINGER, PERSINGERS INCORPORATED and AGEE

This case evolves around, and is totally consumed by, the attempt by a combination of minority shareholders of PI to gain control of that corporation. These minority shareholders, self-named as the "Meredith Persinger Group," holding approximately sixteen percent

(16%) of the outstanding stock of PI, have, individually and collectively, disrupted the control and management of PI since the annual director's meeting of March 2, 1985.

At this March 2, 1985 meeting, Meredith Persinger was removed as President of PI and R. Frank Carmazzi (Carmazzi) was installed as President. Shortly thereafter, John A. Persinger, one of those who voted for the management change and the owner of 5,592 shares, or forty-eight percent (48%) of PI's stock, died and The First Huntington National Bank (First Huntington) qualified as executor of his estate. As executor, First Huntington controlled the forty-eight percent (48%) interest in PI. Meredith Persinger and his son, Thomas Persinger, attempted to block First

Huntington's election of a representative on the Board of Directors by refusing to attend directors meetings and by seeking a court order preventing the holding of a special shareholders meeting. After the requested order was denied, a special meeting of shareholders was called and William F. Agee (Agee), a Senior Vice-President and Trust Officer of First Huntington was installed as a director of PI.

Members of the Meredith Persinger Group caused considerable disruption of the operation of PI after the removal of Meredith Persinger as President. For example, Meredith Persinger countermanded decisions made by Carmazzi, interfered with contractual relations established by Carmazzi with PI suppliers and contributed to the client and moral of

employees. Meetings of the Board of Directors of PI were conducted in an angry atmosphere and there were major disagreements and disruptions in the control and management of the business.

Thereafter, Meredith Persinger, aided by his son, Thomas Persinger, on seven different occasions between June 1985 and January 1987, and on his own initiative, offered to purchase the stock of PI held by First Huntington. Each offer was received but rejected by First Huntington's Trust and Investment Committee. In turn, each offer was countered following consultation with the Trust and Investment Committee based on advice from a valuation consultant. The final response of First Huntington was to offer to sell the forty-eight percent (48%) bloc to Meredith Persinger for $275

a share. However, Meredith Persinger rejected this offer.

At this juncture, defendants Carmazzi, W. Guy Wiles, Jr., (Wiles) and John C. Morton (Morton) made an unsolicited offer to First Huntington to purchase the shares for $275 a share which resulted in the parties entering into a letter of intent. Then Wiles and Morton decided that they did not want to participate and Carmazzi, individually, decided to purchase the stock at the price rejected by Meredith Persinger in order to maintain the corporation as an ongoing business and preserve the jobs of PI's employees. Upon completion of the sale to Carmazzi, Agee, the Bank's representative, resigned from the PI board on April 27, 1987.

PI was then merged into Sales Two, Inc., (Sales Two) a company controlled by Carmazzi, and all minority shareholders, including Meredith Persinger and the plaintiffs, were cashed out as shareholders of PI.

Prior to the merger of PI and Sales Two and before the sale of stock to Carmazzi, the bylaws of PI were amended repealing a bylaw provision which placed restrictions upon, but did not prohibit, the purchase of stock by officers and directors of PI. The notice of the annual shareholder's meeting sent to all shareholders, as is proper under the West Virginia Corporation Act, did not state that repeal of this bylaw provision would be taken up at this shareholder's meeting. Also prior to the sale and merger, the Board of Directors approved

the purchase of 832 shares of stock held by eight shareholders, upon the request of those shareholders without any solicitation by any officer or director of PI for such purchases.

STATEMENT OF DEFENDANT FIRST HUNTINGTON

The defendant First Huntington contests plaintiffs' summary of the facts and theory of liability. It strongly denies that it violated any duty owed any of the plaintiffs, including fiduciary duties as a stockholder or director of Persingers. It offers the following summary of material facts on its own behalf:

Persingers Incorporated is a West Virginia corporation headquartered in Charleston, West Virginia and is in the business of selling mining and industrial machinery, tools, parts and supplies.

Persingers Incorporated employs approximately 26 employees. As of the date of its Annual Meeting (March 7, 1987), 48% or 5,592 shares of the outstanding stock of Persingers Incorporated were held in trust by The First Huntington National Bank for the estate of John Persinger, deceased.

At the annual shareholders' meeting, held on March 7, 1987, Section 5.4 of the bylaws of Persingers Incorporated was repealed. Section 5.4 imposed restrictions on purchases of Persingers stock by its officers and directors, but did not prohibit such purchases. The notice of the meeting did not specify that the repeal of Section 5.4 of the By-laws was to be taken up, nor did the call of the meeting specify the agenda for all matters to be considered. Nevertheless,

this was all in accordance with West Virginia statutory law. Furthermore, Persingers' counsel, Charles B. Stacy, when asked on the day of the shareholder meeting, opined that no notice to shareholders of the matter was required. At the shareholders' meeting all shares held by the defendants were voted for repeal of the bylaw. The defendants, as of the time of the shareholder meeting, controlled in excess of 50% of the stock of Persingers (55% to be exact) without resort to proxies obtained by management. All of the stock of the plaintiffs voted against the repeal of this bylaw.

On March 7, 1987, the Board of Directors of Persingers at their Annual Meeting (which followed the Shareholder Meeting), voted to redeem 832 shares of Persingers Incorporated at a price of

$220.00 per share from Howard M. Persinger, Sarah Altizer, Sylvia Lentz, Ann Athey, Mary Elswick, Virginia Rengers, and Lillian Voss. Together these shares constituted approximately 7.75% of the stock in Persingers. The individuals whose shares were redeemed had specifically requested that their shares be redeemed and approached the Board of Directors of Persingers Incorporated on their own accord. At no time did any member of the Board of Directors of Persingers solicit that stock for redemption or sale. Moreover, the stock was not needed to give the defendants and Mr.Carmazzi control of the corporation or a majority of the stock.

On April 17, 1987, R. Frank Carmazzi, through Sales One, Inc., a corporation wholly owned by him,

purchased from The First Huntington National Bank all 5,592 shares of Persingers Incorporated held by it in trust for a price of $275.00 per share. This stock had previously been offered to the plaintiffs' Persinger group at the same price per share, but the offer had been rejected on November 6, 1986. Simultaneously with this sale of stock to Carmazzi, William F. Agee, a Trust Officer of The First Huntington National Bank, sitting on the Board of Directors of Persingers Incorporated by reason of the Bank's stock interest, resigned as a director.

After the sale was consummated and after Mr. Agee's resignation from the Persinger Board, a Special Directors' Meeting was held on April 27, 1987. At that meeting, William A. Tantlinger was

nominated as a director of Persingers Incorporated to fill the vacancy caused by Mr. Agee's resignation, and the Board voted to recommend to the shareholders of Persingers a triangular merger of Sales One, Inc., Sales Two, Inc. and Persingers Incorporated.

Then, at a Special Shareholders' Meeting of Persingers Incorporated held on May 29, 1987, a merger was effected between Sales One, Inc. and Persingers Incorporated with Sales One, Inc. remaining as a surviving corporation and all minority shareholders of Persingers Incorporated receiving Two Hundred Twenty-Two Dollars per share of their stock. The defendant Agee, Trust Officer for First Huntington, did not know that a "cash out merger" would be used.

5. In jury and non-jury cases, for each party, a single listing of the contested issues of fact; and a single listing of the contested issues of law, together with case and statutory citations.

STATEMENT OF PLAINTIFFS

As pointed out earlier, plaintiffs have filed a motion for summary judgment. Accordingly, from plaintiffs' perspective, there are no contested issues of fact. The contested issues of law concern the propriety of the Court's December 11, 1991, Order and whether plaintiffs' are entitled to rescission.

Plaintiffs' legal authorities for the position that the December 11, 1991 Order is in error are set forth in the legal papers heretofore filed by

plaintiffs and such authorities are incorporated herein by reference.

STATEMENT OF DEFENDANTS CARMAZZI, SALES ONE, INC., SALES TWO, INC., MORTON, WILES, TANTLINGER, PERSINGERS INCORPORATED and AGEE

These defendants are uncertain as to what the contested issues of law remain. In their pretrial order, plaintiffs set forth no cause of action but only a remedy. Inasmuch as plaintiffs have not set forth with specificity in their portion of the pretrial order exactly what cause of action they wish to pursue in this case, it is impossible for these defendants to set forth intelligently the contested issues of law remaining for trial.

These defendants would draw the Court's attention to their memorandum in support of their motion for summary judgment and reply memorandum, together

with the memorandum of defendant First Huntington, for their position on the issues set forth in plaintiffs' motion for summary judgment.

STATEMENT OF DEFENDANT FIRST HUNTINGTON

Because of the vague nature of plaintiffs' statement of the issues in their pretrial order, it is extremely difficult for the defendant First Huntington to delineate a thoughtful, coherent position on the contested issues of fact and law. While plaintiffs speak of violations of fiduciary duty, they, nevertheless, at no place flatly state that they abandoned their other claims of conspiracy, fraud, conversion and Securities Exchange Act violations. However, since these claims have not been mentioned as contested issues of law, we assume that plaintiffs now contend only

for violation of fiduciary duty and seek only the non-damage remedy of rescission.

[A] FIRST HUNTINGTON'S CONTESTED ISSUES OF FACTS

Plaintiffs state that, from their standpoint, there are no contested issues of fact because they have a motion for summary judgment pending. But, contrary to that, the First Huntington maintains that, as to Plaintiffs position, there are the following contested issues of fact:

(1) Did The National Bank of Commerce require 100% stock ownership as a condition to making a loan to Carmazzi;

(2) Did the defendants control in excess of 50% of Persingers stock prior to March 7, 1987;

(3) Did First Huntington or Agee know about the proposed bylaw repeal prior to March 7, 1987;

(4) Prior to March 7, 1987 did First Huntington or Agee know that the proposal to redeem 832 shares of stock was to be taken-up at the March 7, 1987 meeting of directors; and if they did know about the redemption what did they know its purpose to be;

(5) Prior to the sale of the John A. Persinger block of stock, did First Huntington or Agee know that the minority stockholders of Persingers were to be "cashed out";

(6) Did Bylaw §5.4 prohibit a sale by First Huntington to Carmazzi;

(7) Did Bylaw §5.4 place a duty upon First Huntington or Agee to ensure that Carmazzi complied with said Bylaw;

(8) Did First Huntington or Agee or any other Director deliberately conceal the fact that Bylaw §5.4 was repealed; and

(9) Did the minority shareholders receive fair value for these shares?

[B] FIRST HUNTINGTON'S CONTESTED ISSUES OF LAW

First Huntington, in response to Plaintiffs' position on the legal issues, denies that the Court's order of December 11, 1991 was in error and further insists

that Plaintiffs are not entitled to summary judgment. Additionally, it is pointed out that all of the defendants have pending their own motions for summary judgment which have extensively discussed the controlling law of this case. While First Huntington here lists the issues of law it believes to be contested in this case, it here will only generally outline its position on these issues referring to its briefs in support of its motions for summary judgment for a more complete exposition. The contested issues of law, as seen by First Huntington, follow:

1. Is notice required of the matters to be taken up at an annual meeting of a corporation under West Virginia law?

Under West Virginia corporation law, shareholders are entitled only to receive notice of the place, day and hour of the meeting. The purpose of the meeting is not required. See, Section 31-1-19, West Virginia Corporation Act. See also, Comment No. 2 to Section 29 of the Model Business Corporation Act which is identical to W.Va. § 31-1-19, pointing out that:

> "The Model Act does not require the notice of an annual meeting state the purpose or purposes for which the meeting is called. . ."

See also, Rowland v. Rowland, 102 Id. 534, 633, P.2d 599 (1981) and Model Act Annotated, (3d Ed. 1986) official comment to §7.05 p. 548-549.

2. Is a cash out merger lawful under West Virginia corporate law?

The West Virginia legislature has acknowledged and approved cash out mergers by giving minority stockholders the right to have their shares appraised if a cash out merger has taken place. Section 31-1-123 of the West Virginia Corporation Act. See also, The Matter of Fair Value of Shares, 399 S.E.2d 678 (W.Va. 1990).

3. Is the sole remedy for plaintiffs the appraisal and evaluation procedure set forth under § 31-1-123 of the West Virginia Corporation Act, sometimes known as The West

Virginia Dissenters Rights Statute?

Basically, what this case comes to is that Plaintiffs are minority stockholders who are disgruntled with a cash out merger permitted by West Virginia Corporate law, but whose exclusive remedy, if any is called for, lies in the stock valuation procedure afforded under the West Virginia Corporations Act § 31-1-123. First Huntington maintains that the West Virginia Supreme Court of Appeals in Matter of Fair Value of Shares, 399 S.E.2d 678 (W.Va. 1990) has expressly acknowledged that cash out

mergers are not illegal and has found that the exclusive remedy for disgruntled minority shareholders such as plaintiffs is found in The Dissenters Rights Statute.

4. Did First Huntington have the right to vote its shares for repeal of Bylaw §5.4? See No. 5 below.

5. Did First Huntington have a duty to disclose the purpose and intended effect of repeal of Bylaw §5.4?

It is the First Huntington's position as to this issue as well as number 4 above that it is guilty of no breach of any duty. Majority stockholders have no fiduciary duty to

minority stockholders to refrain from receiving a premium from the sale of their stock. Daniel v. Painter, 418 F.2d 545 (10th Cir. 1969); Haberman v. Mercheson, 331 F.Supp. 180 (S.D.N.Y. 1971); Stromfeld v. Great Atlantic & Pacific Tea Company, Inc., 484 F. Supp. 1264 (S.D.N.Y. 1980); Dasho v. Susquehanna Corporation, 461 F.2d 11 (7th Cir. 1972); Christophides v. Porco, 289 F.Supp. 403 (S.D.N.Y. 1968); Claggett v. Hutchison, 583 F.2d 1259 (4th Cir. 1978).

West Virginia has long recognized that, "[a]lthough directors may occupy a

fiduciary capacity in some instances, such relationship is lacking in others." Bank of Mill Creek v. Elk Horn Coal Corporation, 133 W.Va. 639, 57 S.E.2d 736, 748 (1950). One instance where the fiduciary relationship is lacking is when a shareholder votes at a shareholders' meeting.

At a Shareholders' meeting each shareholder, even a director shareholder, represents himself and his own interests and in no sense acts as a fiduciary for the other shareholders, minority or majority. The controlling rule is stated in 5 Fletcher Cyclopedia of Law of

Private Corporations, § 2031, P. 181 (Perm. Ed. 1987):

> ...The stockholder may vote contrary to what other stockholders deem to be the best interest of the corporation, or even detrimental to it. This is equally true of a stockholder who is also a director voting as a stockholder. (Emphasis added).

This statement of the law is supported by West Virginia case law. In Thurman v. Paragon Colliery Co., 82 W.Va. 49, 95 S.E. 816, 817 (1918), the Court stated:

> The reason for denying to a director of a corporation the right to vote on a matter in which he is otherwise interested, than as a stockholder in the corporation is because of the fiduciary or trust relation he bears toward it. 4 Thompson on Corporations (2d Ed.),

Sec. 4467. But that reason does not apply to a stockholder, and he is not denied his right to vote on any matter properly coming before a stockholders' meeting on account of any private interest he may have which is detrimental to the corporation. 4 Thompson on Corp., Sec. 4467; Shaw v. Davis, 78 Md. 308, 28 Atl. 619, 23 LRA 294; Windmuller v. Standard Distilling & Distributing Co., 114 Fed. 491. In Gamble v. Queens County Water Co., 123 N.Y. 91, 9 LRA 527, it was held: 'a shareholder has a legal right, at a meeting of the shareholders, to vote upon a measure even though he has a personal interest therein separate from other shareholders. In such a meeting each shareholder represents himself and his own interests solely, and he in no sense acts as a trustee or representative of others.' The only restriction upon this right of a shareholder seems to be that the matter must not be illegal nor ultra vires,

> and the action of the majority of its shareholders must not be so antagonistic to the corporation as a whole, as to indicate that their interests are wholly outside of the interests of the corporation and destructive of the interests of the minority shareholders. (Emphasis added).

Similarly, see Kirwan v. Parkway Distillery, 285 Ky. 605, 148 S.W.2d 720 (1941); Green v. Felton, 42 Ind. App. 675, 84 N.E. 166, 169, 170 (1908), quoting Hodge v. U.S. Steel Corp., 64 N.J. Eq. 807, 54 A. 1 (1903).

The Supreme Court of Delaware in Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 958 (del. 1985), more recently observed that "[n]othing

precludes Mesa [owner of approximately 13% of the corporations' stock], as a stockholder, from acting in its own self-interest." In support of this proposition it cited decisions beginning with the 1918 decision of duPont v. duPont, 251 F. 937, 944 (D.C. Del. 1918), aff'd 256 F. 129 (3rd Cir. 1919).

In contrast to these cases which are directly on point and address a shareholders right to vote his or her own self interest, the cases cited by plaintiffs seeking to impose a fiduciary duty upon defendants, deal with far different circumstances.

Bailey v. Vaughn, 178 W.VA. 371, 359 S.E.2d 599 (1987), addressed the question of whether a director of a corporation has a fiduciary duty to disclose material information affecting the value of stock when purchasing stock from minority shareholders. Masinter v. WEBCO CO., 164 W.Va. 241, 262 S.E.2d 433 (1980), which reversed a trial court's grant of summary judgment, considered a shareholder's allegation that he was frozen out of the benefits of his investment in a close corporation when he was removed from the board and his salary terminated. In Meadows

v. Bradshaw-Diehl Co., 139 W.Va. 569, 81 S.E.2d 63 (1954), the issue arose from the directors' decision not to declare dividends and to establish a building fund. Unquestionably, Carmazzi, Morton, Wiles and Agee, as well as all other shareholders, were entitled to vote, and §5.4 was lawfully repealed by a clear majority exclusive of any management proxies.

6. Did plaintiffs waive any notice requirement by their proxy participating at and voting plaintiffs' stock at the Annual Meeting of Shareholders?

First Huntington maintains that waiver occurred by reason of

plaintiffs' proxy voting their stock at the annual meeting. The West Virginia Supreme Court of Appeals has recognized in Germer v. Triple-State National Gas & Oil Co., 60 W.Va. 143, 54 S.E. 509 (1906) that participation in a stockholders' meeting waives objection to irregularty of notice. See to same effect Rowland v. Rowland, 102 Id. 534, 633 P2d 599 (1981).

7. Have plaintiffs abandoned or waived their rights to all causes of action and claims for damages set forth in their Complaint except for violations of fiduciary duty and rescission as a result of

plaintiffs' complete and absolute failure to mention any other cause of action or request for damages in this pretrial order other than the claim for breach of fiduciary duty and the remedy of rescission?

First Huntington takes the position here that plaintiffs have waived all causes of action and claims for damages except claims of violation of fiduciary duty for which the remedy of rescission is requested.

8. If plaintiffs' Section 10b and Rule 10(b)(5) cause of action asserted in the complaint had

not been abandoned is it barred by the statute of limitations? Any Section 10(b) and Rule 10(b)(5) cause of action is time barred insofar as First Huntington is concerned. The complaint against it was filed on April 18, 1988. First Huntington completed and was finished with its dealings on April 17, 1987 when Mr. Agee resigned from the Persinger board. Moreover, the plaintiffs had knowledge of all matters alleged against the Bank before the suit was instituted against the Bank. For example the by-law change was made on March 7, 1987. The United States Supreme Court has

held in Lampf, Pleva, Lipkind, et al. v. Gilbertson, 111 S.Ct. 2773, 2782 (1991) that 10(b) and Rule 10(b)(5) litigation must be commenced within one year after discovery of the facts constituting the violation.

9. Is reliance upon advice of counsel a defense to an allegation of breach of fiduciary duty?

First Huntington maintains that Agee and the other directors had the right to rely upon the advice of counsel, Charles Stacy, that notice of matters to be taken up at an annual meeting need not be given. The West Virginia Supreme Court of

Appeals has recognized that advice of counsel is an absolute defense in certain situations and goes to the issue of "good faith" in other situations. Powers v. Goodwin 324 S.E.2d 701 (W.Va. 1984). As the Court stated in Powers at p. 705, "It seems clear, though, that the party asserting the defense has the burden of showing that he: (1) made a complete disclosure of facts to his attorney; (2) requested the attorney's advice as to the legality of the contemplated action; (3) received advice that it was legal; and (4) relied upon the advice in good faith."

10. What is the nature of the remedy of rescission requested by plaintiffs and how will that remedy be applied in this case? Plaintiffs nowhere delineate exactly how they intend that the remedy of rescission should be applied, but if what they have argued in the past is to be followed the primary difference between what the plaintiffs advocate as rescission and what First Huntington sees as rescission is that the Bank maintains that the law of rescission require a return to the beginning and places the parties as they were prior to any sale of the Bank's stock. The plaintiffs, on the

other hand, do not advocate true and total rescission. They do not want to put the parties back to same position they were in prior to the sale of the persinger stock held by the Bank as Trustee. In reality, they are not asking for rescission. Instead, they ask the Court, by judicial fiat, to create a situation that never existed and will place them in a position much superior to and much different from that which they held prior to the sale of the stock to Carmazzi.

Plaintiffs request the Court to declare the stock sold to Carmazzi, as well as all stock

once held by the other defendants and their families, to be treasury stock, which will not be allowed corporate voting privileges. If this bit of prestidigitation occurs, the stock held by the Meredith Persinger Group and its supporters will be, by a stroke of the judicial pen, transformed from a decidedly minority holding of around 16% into substantial majority ownership of over 80% in control of the Corporation. Certainly, turning the former majority of the stock into treasury stock and ordering that a contract between the Bank and Carmazzi be deemed to

be a contract between the Bank and Persinger, Inc., does not put everyone back to the same place they were in the beginning. In effect, what is occurring under the procedure proposed by the plaintiffs, is that, by stopping the reversal process at the point where the bylaws were changed and at the same time transferring the stock into the treasury of the corporation, rescission is actually not occurring, and the Court is being asked to order something that never existed and never was contemplated by even the plaintiffs themselves. Rather than returning to the status quo, the plaintiffs plan

would drastically alter the control of the corporation and would inequitably enhance the values of plaintiffs' stock far beyond its original value.

The Fourth Circuit in Sylvania Industrial Corp. v. Lilienfeld's Estate, 132 F.2d 887, 892 (4th Cir. 1943) has explained that rescission of a transaction is

> "'...to abrogate and undo it from the beginning; that is, not merely to release the parties from further obligation to each other in respect to the subject of the contract, but to annul the contract, and to restore the parties to the relative positions which they would have occupied if no such contract had ever been made. Rescission necessarily involves a repudiation of the contract and a refusal of

> the moving party to be further bound by it."

As seen from this quotation, a prime essential is the restoration of each party to the position with reference to his property and rights which he occupied immediately before making of the contract. Numerous state cases affirm this, see 37 Words and Phrases, "Rescission," citing cases like Fuller v. Fried, 224 N.W. 668 (N.Dak. 1929); and under the federal securities acts, it is well established that for the rescission of a sale of securities pursuant to a merger agreement plaintiff "must be in a position to return the defendant to the status quo

ante by tender back of the consideration received." See McIntyre v. KDI Corporation, 406 F.Supp. 592 (D.C. Ohio 1975) and authorities at p. 597 thereof.

In Pittsburgh Terminal Corporation v. Baltimore and Ohio R. Co., 586 F.Supp. 1297 (D.C.Pa. 1984) at 1303, the court affirmed the status quo requirement, but as a corollary worried that care must also be taken that the plaintiff not be placed in a better position than he would have enjoyed if the transaction had not occurred:

> "The purpose of rescission is to place the injured party in the same position he would

> have held in the absence of the violation, E.g., Click, 613 F.2d at 37. Care must be taken that plaintiff is not placed in a better position than he would have enjoyed, a situation amounting to punishment of the defendant. Id.; Rolf v. Blyth, Eastman, Dillon & Co., Inc., 570 F.2d 38 (2d Cir. 1978)." (Emphasis added).

Along the same lines, 13 Fletcher Cyc. Corp. §6040, p. 477, explains that:

> "...The rescission, according to settled principles, cannot be partial, reserving the benefits and rejecting the burdens that fell to the plaintiffs, but it must be entire."

In past briefs plaintiff without specific authority have argued that not only can they obtain rescission but that they can acquire damages, to boot.

See Memorandum in Support of their proposed plan of rescission, p. 18. Following the established rule, the Fourth Circuit in Sylvania Industrial Corporation v. Lilienfeld's Estate, 132 F.2d 887, 893 (4th Cir. 1943) has frowned on double dipping such as this, making it clear "that rescission and an action for damages are inconsistent remedies and cannot coexist." See also Accidental Life Ins. v. Pat Ryan & Assoc. Inc., 496 F.2d 1255 (4th Cir. 1974) at 1269.

Many other courts agree. For example, see Omega Executive Services, Inc. v. Grant, Fed.

Sec. Law Rptr. 98,367, 98,368, (D.C.N.Y. 1980) requiring election; Estate Counseling Service v. Merrill, Lynch, Pierce, Fenner & Smith, 303 F.2d 527, 531 (10th Cir. 1962) holding that a sale cannot be valid and void at the same time; and Quintel Corporation v. Citibank, 596 F.Supp. 797 (S.D.N.Y. 1984) at 803, a securities fraud case, saying "Rescission and restitution are alternatives to money damages."

6. For each party, a list and description of depositions and exhibits to be offered as evidence at trial, indicating as to each whether there are objections to either authenticity or relevancy (if there are objections, the

lines and pages of depositions being objected to must be identified), and a statement that copies of exhibits have been exchanged by counsel or that opposing counsel have examined the exhibits. This list of exhibits of each party shall be on a separate sheet, appended to the pretrial order.

STATEMENT OF PLAINTIFFS

Plaintiffs do not anticipate offering any depositions at trial. Plaintiffs' list of exhibits is attached hereto.

STATEMENT OF DEFENDANTS CARMAZZI, SALES ONE, INC., SALES TWO, INC., MORTON, WILES, TANTLINGER, PERSINGERS INCORPORATED and AGEE

These defendants do not anticipate offering any depositions at the trial of this action, except possibly for the deposition of Martha Brugh.

Attached hereto is a list of exhibits of these defendants.

STATEMENT OF DEFENDANT FIRST HUNTINGTON

First Huntington is aware of no evidentiary depositions to be offered at trial, but reserves the right to use any of the depositions or portions thereof, taken during discovery, as may be needed at trial in accordance with the Federal Rules of Civil Procedure, particularly Rule 32.

Other than the Exhibits listed by plaintiffs and Carmazzi et al., First Huntington knows of no other Exhibits to be introduced at trial.

7. For each party, a list of the names and addresses of all witnesses, indicating those who are to be called as occurrence and as expert witnesses, or

both, and whether the qualifications of the expert are to be stipulated.

STATEMENT OF PLAINTIFFS

Plaintiffs may call the following individuals as witnesses at trial.

1. Joseph M. Persinger
2. Kenneth Williamson
3. M. Thomas Persinger
4. Meredith T. Persinger
5. W. Guy Wiles
6. R. Frank Carmazzi
7. John Copenhaver, III
8. John E. Morton
9. Charles B. Stacy, Esquire
10. David Shapiro, Esquire
11. Deborah Sink, Esquire
12. David Lunsford, Esquire
13. William F. Agee
14. William A. Tantlinger, Esquire
15. Richard E. Whisner

Plaintiffs anticipate calling Roger Osborne as an expert witness to testify at trial.

STATEMENT OF DEFENDANTS CARMAZZI, SALES ONE, INC., SALES TWO, INC., MORTON, WILES, TANTLINGER, PERSINGERS INCORPORATED and AGEE

These defendants may call the following witnesses at the trial of this action:

1. R. Frank Carmazzi
2. John C. Morton
3. W. Guy Wiles, Jr.
4. William F. Agee
5. Meredith T. Persinger
6. M. Thomas Persinger
7. Mrs. Meredith T. Persinger
8. Joseph Persinger
9. John Stockdale (expert witness)
10. Richard Whisner
11. Powers Persinger
12. Charles Stacy

13. David Shapiro

14. Howard Persinger

15. Martha Brugh

16. William A. Tantlinger

17. Annette Vance

STATEMENT OF DEFENDANT FIRST HUNTINGTON

Other than the individuals listed by plaintiffs and Carmazzi et al., First Huntington believes the only other witness to be Christopher D. Contese.

8. Stipulations

STATEMENT OF PLAINTIFFS

None other than granting plaintiffs' motion for summary judgment.

STATEMENT OF DEFENDANTS CARMAZZI, SALES ONE, INC., SALES TWO, INC., MORTON, WILES, TANTLINGER, PERSINGERS INCORPORATED and AGEE

None

STATEMENT OF DEFENDANT FIRST HUNTINGTON

First Huntington is unwilling to stipulate as requested by plaintiffs. First Huntington offers no stipulations.

9. Suggestions for the avoidance of unnecessary proof and of cumulative evidence.

STATEMENT OF PLAINTIFFS

None

STATEMENT OF DEFENDANTS CARMAZZI, SALES ONE, INC., SALES TWO, INC., MORTON, WILES, TANTLINGER, PERSINGERS INCORPORATED and AGEE

None known

STATEMENT OF DEFENDANT FIRST HUNTINGTON

Early rulings on the contested issues of law raised in this Order particularly a ruling as to whether Code §31-1-123 (Dissenters Rights Statute) provides plaintiffs an exclusive remedy.

10. Suggestions concerning any need for adopting special procedures for

managing potentially difficult or protracted aspects of the trial that may involve complex issues, multiple parties, difficult legal questions or unusual proof problems.

STATEMENT OF PLAINTIFFS

None

STATEMENT OF DEFENDANTS CARMAZZI, SALES ONE, INC., SALES TWO, INC., MORTON, WILES, TANTLINGER, PERSINGERS INCORPORATED and AGEE

These defendants need an articulation of the precise claim the plaintiffs intend to make in this case. These defendants request that at the pretrial conference the Judge address these issues. If this case is to be tried as to the question of valuation, appointment of a special master may be appropriate.

STATEMENT OF DEFENDANT FIRST HUNTINGTON

If § 31-1-123 provides an exclusive remedy, a special master should be appointed to hear evidence as to the fair value of the shares of stock of the plaintiffs.

11. Any other matters by counsel deemed relevant for pretrial discussion or disposition.

STATEMENT OF PLAINTIFFS

None

STATEMENT OF DEFENDANTS CARMAZZI, SALES ONE, INC., SALES TWO, INC., MORTON, WILES, TANTLINGER, PERSINGERS INCORPORATED and AGEE

None

STATEMENT OF DEFENDANT FIRST HUNTINGTON

None

12. List of special voir dire questions, if any, that counsel request the Court ask the jury panel.

STATEMENT OF PLAINTIFFS

STATEMENT OF DEFENDANTS CARMAZZI, SALES ONE, INC., SALES TWO, INC., MORTON, WILES, TANTLINGER, PERSINGERS INCORPORATED and AGEE

None. This is a non-jury trial, therefore, there will be no voir dire.

STATEMENT OF DEFENDANT FIRST HUNTINGTON

This is a non-jury trial, therefore, no response is appropriate.

13. A statement setting forth a realistic estimate of the number of trial days required.

STATEMENT OF PLAINTIFFS

7 days

STATEMENT OF DEFENDANTS CARMAZZI, SALES ONE, INC., SALES TWO, INC., MORTON, WILES, TANTLINGER, PERSINGERS INCORPORATED and AGEE

Six days.

STATEMENT OF DEFENDANT FIRST HUNTINGTON

First Huntington believes seven (7) days should be sufficient for a trial of this action. However, if this Court rules that plaintiffs exclusive remedy is found in §31-1-123 of the West Virginia Code then First Huntington believes a trial can be concluded in 2 days.

Signed and submitted by counsel pursuant to the Court's Order as of the 1st day of June, 1992.

ENTER

/s/ Charles H. Haden, II
United States District Judge

/s/ John E. Lutz
Counsel for Plaintiffs

/s/ Edward M. Kowal
Counsel for Defendants,
R. Frank Carmazzi, John C. Morton,
W. Guy Wiles, Jr., William A.
Tantlinger, Esq., William F. Agee,
Sales One, Inc., Sales Two, Inc.
~~and Persingers Incorporated~~

/s/ William C. Beatty
Counsel for First Huntington

Plaintiffs' List of Prospective Exhibits

1. 02-10-86

   Letter to Shareholders of Persingers Inc. from R. Frank Carmazzi.

2. 02-10-86

   Notice of Annual Meeting of Shareholders to be held on March 1, 1986.

3. 03-10-86

   Letter to Shareholders of Persingers Inc. from Persingers Inc.

4. 02-16-87

   Letter to Shareholders of Persingers Inc. from R. Frank Carmazzi.

5. 02-16-87

   Notice of Annual Meeting of Shareholders to be held on March 7, 1987.

6. 03-20-87

Letter to Shareholders of Persingers Inc. from R. Frank Carmazzi.

7. Statement of Income for Persingers Inc. for the years ended December 31, 1986 and 1985.

8. 11-24-86

Extract from Minutes of the Trust Committee The First Huntington National Bank. Re: John A. Persinger Estate.

10. 03-25-87

Extract from Minutes of the Trust Committee The First Huntington National Bank. RE: Persingers Inc.

11. 01-09-87

Letter to Mr. William F. Agee of First Huntington National Bank from Carmazzi, et al.

12. 01-16-87

Letter to R. Frank Carmazzi from William F. Agree of The First Huntington National Bank.

13. 05-26-87

Letter to R. Frank Carmazzi from Joseph M. Persinger with Offer to Sell Shares and Amendment of Offer attached.

14. 05-22-87

Letter to Shareholders of Persingers Inc. from John C. Morton at Persingers Inc.

15. 03-07-87

Letter to Mr. William F. Agree of The First Huntington National Bank from R. Frank Carmazzi.

16. 03-13-87

Letter to Richard E. Whisner, Jr. form R. Frank Carmazzi with proposal plan attached. (Plan to purchase

Persingers Inc.; Time Frame; Loan Redemption; Loan Redemption Schedule; Letter of Intent from The First Huntington National Bank; and Persingers Incorporated Financial Statements).

17. Plaintiffs intend to introduce the following legal bills as exhibits:

Billing Date:	To:	From:
01-21-87	Persingers Inc.	Spilman, Thomas, Battle & Klostermeyer
02-18-87	Persingers Inc.	Spilman, Thomas, Battle & Klostermeyer
03-13-87	Persingers Inc.	Spilman, Thomas, Battle & Klostermeyer
04-17-87	Persingers Inc.	Spilman, Thomas,

		Battle & Klostermeyer
05-26-87	Persingers Inc.	Spilman, Thomas, Battle & Klostermeyer
07-17-87	Persingers Inc.	Spilman, Thomas, Battle & Klostermeyer
12-09-86	Carmazzi, et al.	Spilman, Thomas, Battle & Klostermeyer
01-21-87	Carmazzi, et al.	Spilman, Thomas, Battle & Klostermeyer
02-18-87	Carmazzi, et al.	Spilman, Thomas, Battle & Klostermeyer
03-13-87	Carmazzi, et al.	Spilman, Thomas, Battle & Klostermeyer

04-17-87	Carmazzi, et al.	Spilman, Thomas, Battle & Klostermeyer
April, May & June 1987	Persingers Inc.	Campbell, Woods, Bagley, McNeer & Emerson

Plaintiffs may introduce into evidence the following:

EXHIBIT LIST OF CARMAZZI, ET AL.

Following is a preliminary list of exhibits in this case. These defendants reserve the right to use as an exhibit any document heretofore exchanged in discovery or voluntarily in this case.

1. Minutes of Directors and Shareholders of PI 3/3/84 through 5/1/87
2. Bylaws - Section 5.4
3. Letter dated June 25, 1985 from M. T. Persinger to William Agee
4. Letter dated September 11, 1985, from William Agee to M. T. Persinger
5. Letter dated May 9, 1986, from M. T. Persinger to William Agee with letter dated April 22, 1986

6. Letter dated June 12, 1986, from M. T. Persinger to William Agee

7. Letter dated July 17, 1986, from M. T. Persinger to William Agee

8. Letter dated July 25, 1986, from M. T. Persinger to William Agee

9. Letter dated July 31, 1986, from M. T. Persinger to William Agee

10. Letter dated October 30, 1986, from William Agee to M. T. Persinger

11. Letter dated November 6, 1986, from M. T. Persinger to William Agee

12. Letter dated November 25, 1986, from M. T. Persinger to

directors of Persinger Incorporated

13. Letter dated December 8, 1986, from M. T. Persinger to William Agee

14. Letter dated January 27, 1987, from M. T. Persinger to William Agee

15. Letter dated March 19, 1987, from M. T. Persinger to William Agee

16. Letter dated March 28, 1985, from Tom Persinger to Noel Copen

17. Shareholder list before and after March 1987 redemptions

18. Letter dated October 8, 1986, from Martha Brugh to Frank Carmazzi

19. Letter dated December 13, 1986, from Howard Persinger to Frank Carmazzi

20. Letter dated January 7, 1987, from Mary V. Elswick to Frank Carmazzi

21. Letter dated January 12, 1987, from Virginia V. Rengers to Frank Carmazzi

22. Letter dated January 12, 1987, from Lillian B. Vass to Frank Carmazzi

23. Loan Agreement between Frank Carmazzi and National Bank of Commerce

24. Proxy Statement

25. Letter dated May 5, 1987, from Southeast Bank to Frank Carmazzi

26. Letter dated May 11, 1987, from Frank Carmazzi

27. All financial statements of PI

28. All valuation reports oof Coopers & Lybrand

29. All valuation reports prepared by Management Advisory Services, Inc.

30. Letter of October 1986, from K. Williamson to Meredith Persinger

ENTERED: MARCH 25, 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

SOUTHEAST BANK, et al,

Plaintiffs,

vs. CIVIL ACTION NO. 2:87-0462

R. FRANK CARMAZZI, et al.

O R D E R

Pending is the motion of Plaintiff Southeast Bank, N.A., for substitution of parties. The Court grants the motion and ORDERS that Kenneth T. Williamson and Carol Preston Williamson shall be substituted as party Plaintiffs in place of Southeast Bank, N.A.

The Clerk is directed to send a copy of this Order to counsel of record.

ENTER: March 25, 1992

/s/ Charles H. Haden II
Chief Judge

ENTERED: MARCH 24, 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

SOUTHEAST BANK, et al,

Plaintiffs,

vs. CIVIL ACTION NO. 2:87-0462

R. FRANK CARMAZZI, et al,

Defendants.

O R D E R

Pending is Plaintiffs' motion for reconsideration of the Court's Order dated December 11, 1991. Having carefully considered this matter, the Court DENIES the Plaintiffs' motion and ORDERS that the December 11, 1991, Order shall remain in full force and effect.

The Clerk is directed to send a copy of this Order to counsel of record.

ENTER: March 24, 1992

/s/ Charles H. Haden, II
Chief Judge

ENTERED: FEBRUARY 26, 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

SOUTHEAST BANK, et al,

Plaintiffs,

vs. CIVIL ACTION NO. 2:87-0462

R. FRANK CARMAZZI, et al,

Defendants.

O R D E R

Pending is the motion of Defendants R. Frank Carmazzi, Sales One, Inc., Sales Two, Inc., John C. Morton, W. Guy Wiles, Jr., William A. Tantlinger, Esquire, Persinger, Inc., and William Agee to modify the Time Frame Order. The Court grants the motion and ORDERS as follows:

1. All dispositive motions shall be filed by April 20, 1992, with response and reply due thereafter in accordance with the Local Rules.

2. Counsel for the Plaintiffs shall prepare and submit their portion of the proposed pretrial order to counsel for the Defendants by April 19, 1992, and counsel for the Defendants shall submit to the Court the proposed integrated pretrial order by April 26, 1992.

3. A pretrial conference shall be held at 4:30 p.m. on Monday, June 1, 1992, in Charleston.

4. A final settlement conference shall be held at 9:00 a.m. on Monday, July 6, 1992, in Charleston.

7. The trial of this action shall commence at 9:30 a.m. on Tuesday, July 7, 1992, in Charleston.

Pending is Plaintiffs' motion to modify the Time Frame Order to permit joinder of additional parties. The Court

DENIES the Plaintiffs' motion to modify the Time Frame Order.

The Court further **DENIES** the motion of Defendant The First Huntington Bank to modify and change Time Frame Order.

The Clerk is directed to send a copy of this Order to counsel of record.

ENTER: February 26, 1992

/s/ Charles H. Haden II
Chief Judge

ENTERED: DECEMBER 11, 1991

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

SOUTHEAST BANK, et al,

Plaintiffs,

vs. CIVIL ACTION NO. 2:87-0462

R. FRANK CARMAZZI, et al,

Defendants.

O R D E R

Pending is Plaintiffs' motion for attorney fees, Plaintiffs' motion to implement recission, and Plaintiffs' motion to vacate order of reference to special master. The Court DENIES the motion for attorney fees and DENIES the motion to implement recission. The Court GRANTS the motion to vacate order of reference to special master.

Numerous hearings have been held regarding the Plaintiffs' request for a

preliminary and permanent injunction. The Honorable Dennis R. Knapp, Senior United States District Judge for the Southern District of West Virginia, treated these hearing as a trial on the merits of the requested relief when issuing his Order entered December 29, 1988, and the accompanying Memorandum Opinion entered January 5, 1989. Defendants William F. Agee and the First Huntington National Bank now complain that they were not permitted to engage in discovery, file dispositive motions and proceed towards the trial of this action. These Defendants assert that they were not privy to the alleged agreement of the parties to treat these hearings as a trial on the merits and moreover, they complain that there is no written stipulation in the record of this matter

indicating that the parties consented to a trial to the Court.

Without addressing the appropriateness of the ultimate conclusion reached by Judge Knapp, the Court concludes that the Order and Memorandum Opinion were issued prematurely. Accordingly, the Court ORDERS that the Order December 29, 1988, and accompanying Memorandum Opinion entered January 5, 1989, are vacated and that this action will proceed pursuant to a Time Frame Order to be set by the Court.

The Court further ORDERS that a scheduling conference shall be held at 3:00 p.m. on Monday, December 23, 1991, in Parkersburg. Lead counsel for each party shall appear in person and be prepared to discuss the appropriate Time

Frame Order to resolve this action most expeditiously.

The Clerk is directed to send a copy of this Order to counsel of record.

ENTER: December 10, 1991

/s/Charles H. Haden II
Chief Judge

ENTERED: JULY 23, 1991

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

SOUTHEAST BANK, N.A.; JOSEPH M. PERSINGER, on behalf of themselves and all other shareholders of Persingers Incorporated,

Plaintiffs

Vs. Civil Action No. 2:87-0462

R. FRANK CARMAZZI; SALES ONE, INC., a West Virginia corporation; SALES TWO, INC., a West Virginia corporation; JOHN C. MORTON; W. GUY WILES, JR.; WILLIAM A. TANTLINGER; PERSINGERS INCORPORATED, a West Virginia corporation; WILLIAM F. AGEE; FIRST HUNTINGTON NATIONAL BANK, N.A.,

Defendants

O R D E R

For reasons appearing to the Court, it is hereby ORDERED that this action be transferred from the docket of the undersigned judge to the Honorable Charles H. Haden II, Chief Judge, for all further proceedings to be had therein.

The Clerk is directed to send a certified copy of this order to counsel of record herein and to Chief Judge Haden.

DATED: July 23, 1991

/s/ Dennis R. Knapp
Judge

ENTERED: JANUARY 29, 1991

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

SOUTHEAST BANK, et al,

Plaintiffs,

vs. CIVIL ACTION NO. 2:87-0462

R. FRANK CARMAZZI, et al,

Defendants.

O R D E R

Because of the exceptional character and complexity of this civil action and in order to facilitate the prompt and just resolution of all matters in dispute in this civil action, it is hereby ORDERED that this action be, and the same is, referred to William E. Hamb as Special Master, pursuant to Rule 53 of the Federal Rules of Civil Procedure. Said Special Master is hereby authorized and directed to consider all issues

involving the merger between Persinger's Incorporated and Sales One, Inc., and Sales Two, Inc., and to report to the Court his findings of fact and conclusions of law with regard thereto. It is further ORDERED that the Special Master submit his proposed findings of fact and conclusions of law and recommendations for the disposition thereof to this Court with 45 days of the date all proceedings before said Special Master are concluded.

In the conduct of these proceedings, the Master has and shall exercise the power to regulate all proceedings in every hearing before the Master and to do all acts and take all measures necessary or proper for the efficient performance of the Master's duties under the order. The Master may require the production

before the Master of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. The Master may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may examine them and may call the parties to the action and examine them upon oath. When a party so requests, the Master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in the Federal Rules of Evidence for a court sitting without a jury.

For his services in this matter, the Special Master shall be entitled to the sum of $125.00 per hour while engaging in

resolution of this case with said total amount to be fixed by the court and to be charged to and paid by Persinger's Incorporated.

The Clerk is directed to send copies of this order to counsel of record herein.

DATED: January 28, 1991

/s/ Dennis R. Knapp
Judge

ENTERED: AUGUST 30, 1990

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

SOUTHEAST BANK, N.A. and
JOSEPH M. PERSINGER, on
behalf of themselves and
all other shareholders of
Persingers Incorporated, a
West Virginia corporation,

Plaintiff,

vs. Civil Action No. 87-0462

R. FRANK CARMAZZI, SALES
ONE, INC., A West Virginia
corporation; SALES TWO, INC.,
a West Virginia corporation;
JOHN C. MORTON, W. GUY WILES,
JR., WILLIAM A. TANTLINGER, ESQ.,
and PERSINGERS INCORPORATED, a
West Virginia corporation

Defendants.

ORDER

By a prior Order entered December 29, 1988 and accompanying Memorandum Opinion entered January 5, 1989, the Court rescinded the May 27, 1987 merger between Persingers Incorporated and Sales

One, Inc. and Sales Two, Inc. and thereafter stayed implementation of such prior Order pending an appeal of the same by defendants. In accordance with the August 3, 1990 per curiam opinion of the United States Court of Appeals for the Fourth Circuit, coupled with the August 24, 1990 Mandate, it is apparent that this matter is now ripe for the Court to implement the actual rescission of the challenged merger. Accordingly, it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. That on or before September 14, 1990, plaintiffs and defendants shall file with the Court and serve upon opposing counsel their respective plans, if any, as to how the challenged merger should be rescinded and such plans shall set forth in detail the specific steps

involved in rescinding the merger and the applicable dates for the same. The parties are further instructed to file with the Court and serve upon opposing counsel on or before September 14, 1990 any Supplemental Findings of Fact and Conclusion of Law deemed necessary to support their respective plans.

2. That a hearing shall be held on Tuesday, September 18, 1990 at 2:00 p.m. concerning the implementation of the plans for rescission and supporting papers submitted by the parties in accordance with the preceding paragraph.

The Clerk is directed to send certified copies of this Order to counsel of record.

DATED: August 30, 1990

/s/ Dennis R. Knapp
Judge, United States District Court for the Southern District of West Virginia

FILED: AUGUST 21, 1990

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 89-2610
(CA-87-462-2)

Southeast Bank, N.A., et al.,

Plaintiffs-Appellees,

versus

R. Frank Carmazzi, et al.,

Defendants-Appellants.

O R D E R

The Court amends its opinion filed August 3, 1990, as follows:

On page 5, after the first paragraph, the following paragraph is inserted:

> It could possibly be argued that an order of rescission is tantamount to an

injunction, thus appealable under 28 U.S.C. § 1292(a)(1). This argument is answered in Pettinelli v. Danzig, 644 F.2d 1160 (5th Cir.. Unit B 1981), by a panel consisting of two Circuit Judges from what is now the Eleventh Circuit, and a visiting Circuit Judge. In rejecting this argument, the court said:

> "Injunction" and "rescission" are not synonymous. Plaintiffs can no more convert a prayer for rescission into one for injunction than they can convert a partial disposition into an appealable final judgment.

The foregoing authority, together with McKinney v. Gannett Co., 694 F.2d 1240 (10th Cir. 1982), also deals specifically with whether an order of "rescission" constitutes a final appealable order. Obviously, it does not.

The second full paragraph on page 5 begins "Unless otherwise provided by statute."

For the Court-By Direction

/s/ John M. Greacen
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2610

SOUTHEAST BANK, N.A.,; JOSEPH M. PERSINGER, on behalf of themselves and all other shareholders of Persingers Incorporated,

Plaintiffs-Appellees

versus

R. FRANK CARMAZZI, SALES ONE, INC., a West Virginia corporation; SALES TWO, INC., a West Virginia corporation; JOHN C. MORTON; W. GUY WILES, JR.; WILLIAM A. TANTLINGER; PERSINGERS INCORPORATED, a West Virginia corporation; WILLIAM F. AGEE; FIRST HUNTINGTON NATIONAL BANK, N.A.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. Dennis R. Knapp, Senior District Judge. (CA-87-462-2)

Argued: January 10, 1990

Decided: August 3, 1990

Before HALL, Circuit Judge, MERHIGE, Senior United States District Judge for the Eastern District of Virginia, sitting by designation, and HOFFMAN, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Dismissed and remanded by published per curiam opinion.

ARGUED: Robert Kennerly Emerson, CAMPBELL, WOODS BAGLEY, EMERSON, McNEER & HERNDON, Huntington, West Virginia for Appellants. John E. Lutz, DODSON, RICCARDI & LUTZ, Charleston, West Virginia, for Appellees. ON BRIEF: E. M. Kowal,Jr., Cheryl L. Connelly, CAMPBELL, WOODS, BAGLEY, EMERSON, McNEER & HERNDON, Huntington, West Virginia; David A. Faber, SPILMAN, THOMAS, BATTLE & KLOSTERMEYER, Charleston, West Virginia; William C. Beatty, Daniel J. Konrad, HUDDLESTON, BOLEN, BEATTY, PORTER & COPEN, Huntington, West Virginia, for Appellants. J. W. Riccardi, DODSON, RICCARDI & LUTZ, Charleston, West Virginia; Michael Houghton, MORRIS, NICHOLS, ARSHT & TUNNEL, Wilmington, Delaware, for the Appellees.

PER CURIAM:

This is an appeal in a stockholders' action in which the district court ordered a rescission on December 29, 1988, but never specified the point of time the rescission becomes effective, nor what the stockholders must do to restore the status quo. For the reasons stated herein the judgment of the district order entered on December 29, 1988, is a nonappealable order and is not a final judgment. We have also considered whether this is a "twilight zone" case under Gillespie v. United States Steel Corp., 379 U.S. 148 (1964), but have concluded that an order of rescission requires further action on the trial level prior to noting an appeal.

Appellees filed a nine-count amended complaint against appellants. In sum, appellees sought (1) a temporary and

permanent injunction, (2) alleged breaches of fiduciary duties by appellants seeking $878,000 in compensatory damages and $250,000 in exemplary damages, (3) charged a conspiracy on the part of the appellants with the same quantum of damages as noted above, (4) fraud on the part of the appellants, again with the same claim for damages, (5) charged acts of conversion, the damages being the same, (6) an action under §§ 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10(b)(5), seeking the same amount of compensatory damages but no exemplary damages, (7) protective relief under §§ 41 and 134 of the West Virginia Corporation Code, seeking the appointment of a receiver and the entry of an injunction prohibiting acts of oppression

by the appellants, and (8) that the acts of the appellants are ultra vires and constitute a waste of the assets, with the same compensatory and exemplary damages being asserted.

The gist of the district court order of December 29, 1988, lies in the final two paragraphs which read:

> It is unconscionable that the action taken by the stockholders and directors [Carmazzi group] should be approved. The further action of the stockholders and directors assembled therefore is a nullity and cannot stand. Therefore, it is ORDERED that the acts authorized and the acts promulgated thereunder be rescinded and held for naught.
>
> Realizing the impact of this order upon the corporation itself, and the individuals involved therewith, the Court is of the opinion that a stay of the operation of the same should be granted to permit the parties in interest the opportunity to perfect an appeal to take such action as they deem appropriate.

Reading the foregoing order, together with the Court's findings of

fact and conclusions of law filed January 5, 1989, an inference is drawn that the improper acts of appellants commenced as early as January 1987, when Carmazzi, Wiles and Morton reached an agreement for an option to purchase 5592 shares (48 percent of the Persinger stock) formerly owned by John A. Persinger, a nephew of Meredith T. Persinger who served as President and Chief Executive Officer of Persingers from 1964 until March 2, 1985. John A. Persinger died on March 8, 1985. The stock holdings of John A. Persinger went to the First Huntington National Bank as Executor, and William Agee, its Vice President and Trust Officer was elected to the Board of Directors of Persingers, Inc. on September 17, 1985, and served until April 27, 1987, which was the date on which the Directors voted

to recommend the merger (now rescinded by the district court) to the stockholders of Persingers, Inc. Whether Agee participated as a director when discussions were had as to the prospective merger is not clear, although he apparently did resign as a director as soon as the transfer of the stock was made to Carmazzi or the affiliate corporation formed by Carmazzi.

Unless otherwise provided by statute, we are limited to review only "final decisions" of the district court. A "final decision" generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. Catlin v. United States, 324 U.S. 229, 233 (1945). When we consider such appeals, we know that "[t]he case is not to be sent up in

fragments. . . ." Luxton v. North River Bridge Co., 147 U.S. 337, 341 (1893). With only a decision by the district court granting rescission, we have no knowledge as to what the next step will be, and we can safely predict that, barring a settlement, there will be many issues presented before there is an appealable final judgment.

The appellants filed their notice of appeal on January 10, 1989. The appeal was pending on June 12, 1989, when the district court entered an injunctive order stopping Carmazzi and the Persinger Group from proceeding further with respect to terminating the then existing employees' retirement plan at Persingers. Without discussing the propriety of entering an injunctive order while an appeal is pending, it can be said that

there was no appeal noted from the injunction, and it is not even mentioned in the briefs. Since this case is being remanded to the district court, it is assumed that the order of June 12, 1989, will be vacated and considered further by the district court.

Costs are assessed against appellants.

DISMISSED AND REMANDED

ENTERED: JULY 7, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN
DISTRICT OF WEST VIRGINIA
AT CHARLESTON

SOUTHEAST BANK, NA.A., and JOSEPH M. PERSINGER, on behalf of themselves and all other shareholders of Persingers Incorporated,

Plaintiffs,

v. CIVIL ACTION NO. 2:87-0462

R. FRANK CARMAZZI, SALES ONE, INC., SALES TWO, INC., JOHN C. MORTON, W. GUY WILES, JR., WILLIAM A. TANTLINGER, ESQ., PERSINGERS INCORPORATED, WILLIAM G. AGEE, and FIRST HUNTINGTON NATIONAL BANK, N.A.,

Defendants.

AGREED ORDER

The parties, by and through their undersigned counsel, represented to the Court that they have agreed that the following items are to be included in and made a part of the record transmitted to

the United States Court of Appeals for the Fourth Circuit:

1. The deposition of Ruth Dowd, a copy of which is attached hereto as Exhibit A;

2. The deposition of Howard Persinger, a copy of which is attached hereto as Exhibit B;

3. Copies of the minutes of meetings of the shareholders of Persingers Incorporated and of the meetings of the Board of Directors of Persingers Incorporated that were introduced as a part of a "package" exhibit of all such meetings and marked as defendants' Exhibit No. 1 at the hearings conducted in May, 1987 in the proceeding, but which do not appear in the record for some reasons not apparent to counsel. Copies of those minutes that

the parties wish to make part of the record are attached hereto collectively as Exhibit C;

4. The response of plaintiffs to defendants' Requests for Admissions served upon the defendants on or about December 13, 1988, a copy of which is attached hereto as Exhibit d;

5. Response by defendant Agee to plaintiffs' First Requests for Admissions, a copy of which is attached hereto as Exhibit E;

6. Response by defendant Agee to plaintiffs' Second Requests for Admissions, a copy of which is attached hereto as Exhibit F;

7. Answer by defendant Agee to plaintiffs' First Set of Interrogatories, a copy of which is attached hereto as Exhibit G;

8. Answer by defendant First Huntington to plaintiffs' First Set of Interrogatories, a copy of which is attached hereto as Exhibit H;

9. Plaintiffs' Requests for Admissions to defendant Carmazzi, a copy of which is attached hereto as Exhibit I;

10. Defendant Carmazzi's response to plaintiffs' requests for Admission, a copy of which is attached as Exhibit J;

11. The legal bills of Spilman, Thomas, Battle & Klostermeyer produced by defendant Persingers Incorporated in response to plaintiffs' request for production, copies of which are attached hereto as Exhibit K;

12. The legal bills of Campbell, Woods, Bagley, Emerson, McNeer & Herndon produced by defendant Carmazzi in response to plaintiff's request for

production, copies of which are attached hereto as Exhibit L;

13. Answer by defendant Persingers Incorporated to plaintiff's First Set of Interrogatories, a copy of which is attached hereto as Exhibit M;

14. Answer by defendant Carmazzi to plaintiffs' First Set of Interrogatories, a copy of which is attached hereto as Exhibit N;

15. Response by defendant Agee to plaintiff's First Request for production, a copy of which is attached hereto as Exhibit O; and

16. Response by defendant The First Huntington National Bank to Plaintiff's First Request for Production, a copy of which is attached hereto as Exhibit P.

Based upon the foregoing agreement among the parties, it is hereby ORDERED

that the items set forth above be and the same hereby are to be included in the record transmitted to the United States Court of Appeals for the Fourth Circuit.

The Clerk is directed to send copies of this Order all counsel of record.

Done this 7th day of July, 1989.

/s/ Dennis R. Knapp
Judge, United States District Court for the Southern District of West Virginia

APPROVED FOR ENTRY:

/s/ E. M. Kowal
Counsel for Defendant Carmazzi et al.

/s/ David A. Faber BY EMK
Counsel for Persingers, Inc.

/s/ John E. Lutz
Counsel for Plaintiff

/s/William C. Beatty
Counsel for Defendant First Huntington National Bank

ENTERED: JUNE 12, 1989

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

SOUTHEAST BANK, N.A., and
JOSEPH M. PERSINGER, on behalf
of themselves and all other
shareholders of Persingers
Incorporated

Plaintiffs,

Vs. Civil Action No. 2:87-0462

R. FRANK CARMAZZI, SALES
ONE, INC., SALES TWO, INC.,
JOHN C. MORTON, W. GUY WILES,
JR., WILLIAM A. TANTLINGER,
ESQ., PERSINGERS INCORPORATED,
WILLIAM F. AGEE, and FIRST
HUNTINGTON NATIONAL BANK, N.A.,

Defendants.

ORDER

On May 4, 1989, plaintiffs filed a motion for reconsideration of that portion of the Court's March 1, 1989 order that declined to enjoin the termination of the existing employees' retirement plan at Persingers

Incorporated (Persingers). By Order dated May 18, 1989, the Court decided to reconsider its prior order and to that end set a hearing on plaintiffs' motion for reconsideration for June 5, 1989.

After consideration of the evidence and argument of counsel presented at the June 5, 1989 hearing, the Court is of the opinion that in order to preserve the status quo pending the outcome of the appeal filed by the defendants on January 10, 1989, equity requires that defendants R. Frank Carmazzi (Carmazzi) and Persingers be enjoined from proceeding further with its application to terminate the aforesaid retirement plan. Accordingly, it is hereby ORDERED as follows:

1. That defendant Carmazzi and defendant Persingers be and the same

hereby are enjoined from taking further steps, directly or indirectly, to terminate the existing employees' retirement plan at Persingers and to proceed further with the implementation of the proposed new plan until further order of this Court.

2. That a certified copy of this order be delivered to the Internal Revenue Service, The Pension Benefit Guarantee Corporation, and the Department of Labor within ten days of the entry of the same.

3. That except as modified herein the provisions of the March 1, 1989 order shall remain in effect until the further order of this Court.

The Clerk is directed to mail certified copies of this order to counsel of record herein.

DATED: June 12, 1989

/s/ Dennis R. Knapp
Judge

ENTERED: MAY 18, 1989

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

SOUTHEAST BANK, et al.,

Plaintiffs,

Vs. Civil Action No. 2:87-0462

R. FRANK CARMAZZI, et al.,

Defendants.

O R D E R

Now before the Court is plaintiffs' motion for reconsideration of the order declining to enjoin the termination of the pension plan. For reasons appearing to the Court, it is hereby ORDERED that a hearing on said motion be conducted on June 5, 1989, at 10:30 a.m., in the Court's chambers.

The Clerk is directed to mail certified copies of this order to counsel of record herein.

DATED: May 18, 1989

\s\ Dennis R. Knapp
Judge

ENTERED: MARCH 1, 1989

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

SOUTHEAST BANK, N.A., and JOSEPH M. PERSINGER, on behalf of themselves and all other shareholders of Persingers Incorporated, a West Virginia corporation

Plaintiffs,

Vs. Civil Action No. 2:87-0462

R. FRANK CARMAZZI, SALES ONE, INC., SALES TWO, INC., JOHN C. MORTON, W. GUY WILES, JR., WILLIAM A. TANTLINGER, ESQ., PERSINGERS INCORPORATED, WILLIAM F. AGEE, and FIRST HUNTINGTON NATIONAL BANK, N.A.,

Defendants.

O R D E R

On February 16, 1989, the plaintiffs' motion to implement rescission or to otherwise modify the stay came on for hearing. Based upon the evidence adduced at the hearing and upon argument of counsel, and upon further

other good and sufficient reasons appearing to the Court, the Court finds that plaintiffs are entitled to some measure of protection during the course of the pending appeal herein. Accordingly, it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. Defendant Carmazzi shall not cause Persingers to declare any dividends and Persingers shall not pay any dividends, except to the extent dividends are necessary to permit Sales One, Inc. to make all payments of principal and interest on the indebtedness due and owing by Sales One, Inc. to the National Bank of Commerce, the proceeds of which were Utilized to purchase the John Persinger block of stock of Persingers from The First Huntington National Bank as Trustee.

2. Neither defendant Carmazzi or any corporation controlled by him shall borrow any further funds from Persingers, and Persingers shall not loan any monies to any other person or equity, except in the ordinary course of business.

3. Defendant Carmazzi shall not permit Persingers to engage in any activities of any kind not in the ordinary business of Persingers.

4. Defendant Carmazzi shall on behalf of Persingers file monthly financial statements with the Court and with the plaintiffs.

5. Defendant Carmazzi shall use his efforts to operate Persingers in an efficient and economical fashion.

6. Defendant Carmazzi shall not, except in the ordinary course of

business, encumber, mortgage, or subject to lien any of Persingers' assets.

7. Defendant Carmazzi shall not directly or indirectly initiate or implement any plan of liquidation, merger, consolidation or other reorganization of Persingers.

8. Defendant Carmazzi shall not transfer, sell, or otherwise convey any part of Persingers' assets, or any capital stock of Persingers of Sales One, Inc., except in each case in the ordinary course of business.

9. Defendant Carmazzi shall not, except in the ordinary course of business, grant or sell any option or right to purchase any of Persingers' assets, other than inventory or newly acquired equipment.

10. Defendant Carmazzi shall not change the character of Persingers business.

11. Defendant Carmazzi shall not cause Persingers to increase defendant Carmazzi's level of compensation.

12. Defendant Carmazzi shall not cause Persingers to incur any obligation (fixed or contingent) or enter into any lease, commitment, agreement or other transaction except in the ordinary course of business.

13. Defendant Carmazzi shall not cause Persingers to pay any liability or obligation which is not in the ordinary course of business.

14. All proceeds resulting from the termination of Persingers' pension plan, less expenses and taxes attributable thereto, shall be placed and held in a

special reserve account not subject to withdrawal.

The prohibitions set forth in paragraphs 1 through 14, inclusive, shall remain in effect until further order of the Court.

The Clerk is directed to mail certified copies of this order to counsel of record herein.

DATED: March 1, 1989

/s/Dennis R. Knapp
Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

SOUTHEAST BANK, N.A., and JOSEPH M. PERSINGER, on behalf of themselves and all other shareholders of Persingers Incorporated,

Plaintiffs,

Vs. Civil Action No. 2:87-0462

R. FRANK CARMAZZI, SALES ONE, INC., SALES TWO, INC., JOHN C. MORTON, W. GUY WILES, JR., WILLIAM A. TANTLINGER, ESQ., PERSINGERS INCORPORATED, WILLIAM F. AGEE, and FIRST HUNTINGTON NATIONAL BANK, N.A.,

Defendants.

MEMORANDUM OPINION

This Matter is pending before the Court on plaintiffs' motion for preliminary injunction seeking, inter alia, rescission of the merger of Sales One, Inc. (Sales One), Sales Two, Inc. (Sales Two), and Persingers, Incorporated

(Persingers).[1] The Court will address only the issue of rescission in this opinion.

Based upon the evidence adduced at the hearing herein and the record as a whole, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Plaintiff, Southeast Bank, N.A. (Southeast) is a national banking institution with its principal office in Bradenton, Florida. As Trustee under the will of B. R. Williamson, deceased, Southeast was record owner of 636 shares, or 5.9%, of the shares of common capital stock of Persingers.

---

[1] Counsel for the parties herein agreed to consolidate the Preliminary Injunction with a hearing on the merits.

2. Plaintiff, Joseph M. Persinger, is a citizen of the State of New Jersey and a shareholder in Persingers, owning 76 shares of common capital stock.

3. Defendant, Persingers, is a West Virginia corporation with its principal business at 520 Elizabeth Street, Charleston, West Virginia. At all times relevant herein, Persingers has engaged in the business of selling mining and industrial machinery, tools, parts and supplies throughout southern West Virginia.

4. Defendant, R. Frank Carmazzi (Carmazzi), was hired by Persingers as sales manager in December, 1982.

5. Defendant, Sales One, a West Virginia corporation organized on May 11, 1987, is the sole shareholder of

defendant, Sales Two, a West Virginia corporation.

6. Meredith Persinger was President and CEO of Persingers from 1964 until March 2, 1985. Meredith Persinger's son, Thomas Persinger, a director of Persingers, was Secretary of and counsel to Persingers until March 2, 1982. Meredith Persinger's son, Powers Persinger, was Treasurer of Persingers. Thomas Persinger, Joseph Persinger, Powers Persinger, Meredith Persinger, individually and as Executor and Trustee of his deceased sister Helen P. Ream's estate, Meredith Persinger's wife, and close family members, are hereinafter referred to as the "Persinger Group."

7. On March 2, 1985, John A. Persinger, Meredith Persinger's nephew, owned 5592 or 48% of Persingers stock.

On that date the shareholders elected six directors: Meredith, Thomas, and John Persinger, Carmazzi, W. Guy Wiles, Jr. (Wiles) and John C. Morton (Morton). Carmazzi was then elected to replace Meredith Persinger as President and CEO and Meredith Persinger was elected Chairman of the Board. Thomas Persinger declined to accept the office of secretary to which he was elected and resigned as counsel for Persingers.

8. John Persinger died on March 8, 1985. The First Huntington National Bank (First Huntington) was appointed and qualified as Executor of the estate of John A. Persinger. William Agee (Agee), Vice President and Trust Officer of First Huntington thereafter represented the interests of the Persinger estate,

including the ownership of 5592 shares of Persinger stock.

9. At a special meeting of the shareholders on September 17, 1985, Agee was elected as a Director of Persingers to fill the vacancy resulting from John Persinger's death.

10. Following John Persinger's death, Meredith Persinger and Thomas Persinger continued as directors of Persingers, but refused to attend the board meetings. During that time the Persinger Group attempted to secure an agreement with First Huntington whereby they would be entitled to three members of a seven-member board and Meredith Persinger would become chairman and CEO.

11. On February 10, 1986 notice was given to the Persinger shareholders that adoption of a new set of bylaws was to be

considered at the annual meeting on March 1, 1986. Included in these proposed bylaws was a corporate policy regarding the purchase of shares by directors and officers as a protective measure for minority shareholders.

12. At the March 1, 1986 annual meeting, the following revisions in the bylaws was approved:

> Section 5.4 Purchase of Stock.
>
> (a) It is the policy of this corporation to purchase, for corporate purposes, any shares of the capital stock of this corporation that may be available for purchase, from time to time, if the Board of Directors shall determine in each case that the price and terms of sale are acceptable and that the cash situation of the corporation warrants such purchase. (Emphasis added)
>
> (b) No officer or director of this corporation shall negotiate for the purchase of shares of the capital stock of this corporation from any shareholder, either on behalf of the corporation or

otherwise, and the Board of Directors shall not authorize the purchase of any shares of the capital stock of this corporation from any shareholder, unless there shall be disclosed to the selling shareholder all material facts relevant at such time to the determination of the fair value of such shares, including annual financial reports, audited or unaudited, for the past five years, the latest unaudited financial reports, and any information known to the management of the corporation which is material to a determination of the value of the capital stock of the corporation.

(c) Any officer or director of this corporation who shall receive an offer from a shareholder of this corporation to sell any of the shares of the capital stock of this corporation owned by such shareholder or by any other person, or who shall in any manner be informed that a shareholder of the corporation desires to sell any shares of the capital stock of the corporation, shall forthwith notify the Board of Directors of such offer or desire to sell.

(d) No officer or director of this corporation shall purchase any shares of the capital stock of this corporation from any other shareholder unless the corporation shall first have the opportunity,

after notice to and authorization by the Board of Directors, to purchase such shares at the same price and upon equivalent terms, and the Board of Directors shall determine that it is not in the best interests of the corporation at such time to purchase such shares at such price and on such terms. (Emphasis added)

(e) Any officer or director of this corporation who negotiates with any shareholder of the corporation for the purchase of any shares of the capital stock of the corporation shall be deemed to be negotiating on behalf of the corporation, but shall not have the power to bind the corporation in the absence of specific authorization by the Board of Directors; and any officer or director who shall purchase any shares of the capital stock of this corporation without complying with this Section 5.4 shall be conclusively deemed to have purchased such shares on behalf of the corporation, and upon tender by the corporation of the purchase price of such shares shall, upon approval of such purchase on behalf of the corporation by the Board of Directors, forthwith deliver the certificate or certificates representing the same to the corporation. (Emphasis added)

(f) Any shares of its capital stock acquired by this corporation may be held as treasury stock or

returned to the status of authorized but unissued stock, as the Board of Directors may determine, and, in the absence of any such determination, shall be held as treasury shares. Any shares of capital stock so acquired may thereafter be sold or disposed of as the Board of Directors shall determine.

(g) The provisions of this Section 5.4 shall not apply to any transfer of shares of the capital stock of this corporation, with or without valuable consideration, between a shareholder and his or her spouse, lineal antecedents or descendants, or brother or sister, or any transfer pursuant to testamentary or intestate succession.

13. Bylaw Section 5.4 restricts the purchase of shares in Persingers by officers and directors. Bylaw Section 5.4 provides that any officer or director of Persingers who negotiates for the purchase of any stock of Persingers shall be deemed to be negotiating on behalf of the corporation. It further provides that any officer or director who shall

purchase any shares of Persingers without complying with the Bylaw shall be conclusively deemed to have purchased such shares on behalf of Persingers, and upon tender by Persingers of the purchase price for such shares shall, upon approval of such purchase by the Board of Directors, forthwith deliver the shares to the corporation. Bylaw Section 5.4 further provides that the shares of Persingers acquired under Bylaw Section 5.4 may be held as treasury stock or returned to the status of authorized but unissued stock, as the Board of Directors determines, and, in the absence of any such determination, shall be held as treasury stock.

14. At the annual meeting on March 1, 1986, Carmazzi, Morton, Wiles, and Agee voted the shares held or represented

by proxy to fix the number of corporate directors at five.

15. On October 30, 1986, Agee, on behalf of First Huntington, advised Meredith Persinger that First Huntington would sell him its shares of Persingers for $275 per share and that the offer was good for 21 days.

16. In November, 1986 Carmazzi, Wiles and Norton met with Agee to discuss acquiring the First Huntington's shares of stock.

17. On January 9, 1987 a letter of intent was drafted by Carmazzi, Wiles and Morton, to purchase all but 100 of First Huntington's shares for $275 per share, subject to obtaining financing.

18. On February 16, 1987, notice was sent to the shareholders of Persingers that their annual meeting

would be held on March 7, 1987. This notice did not contain notice that the shareholders would be asked to vote on the repeal of Section 5.4 of the bylaws.

19. After the notice for the annual meeting was sent, and shortly before the holding of the meeting, Carmazzi decided to have the shareholders consider the repeal of Section 5.4 at their 1987 annual meeting.

20. The Defendants, Carmazzi, Morton and Wiles, with William F. Agee, voted the shares and proxies held by them in favor of the motion to repeal Bylaw Section 5.4. M. Thomas Persinger voted the shares and proxies held by him against the motion, and the motion was declared passed.

21. The annual shareholders meeting of Persingers was held on March 7, 1987.

At this meeting the shareholders, by a majority vote, voted to repeal Section 5.4 of the bylaws of Persingers. Thomas Persinger, who was present at this meeting, voted against the repeal on the ground that no notice was given to the shareholders that the repeal would be considered at the meeting.

22. At the request of Carmazzi, on behalf of Persingers, Persingers obtained an appraisal as of April 30, 1986, of the fair market value of a minority interest of the common stock of Persingers from Coopers & Lybrand, independent certified accountants. The purpose of the appraisal was for corporate planning. The value determined by Coopers & Lybrand for a minority interest of the common stock of Persingers was $220 per share.

23. Before the annual shareholders meeting held on March 7, 1987, certain shareholders of Persingers, by letters sent to Persingers, requested that their stock be redeemed. The names of these persons and the number of shares of Persingers held by them are as follows:

Shareholder	Date of Letter	No. of Shares
Martha R. Brugh	October 8, 1986	40
Howard M. Persinger	December 13, 1986	173
Sylvia P. Lentz	December13, 1986	173
Sarah P. Altizer	December 12, 1986	174
Anna S. Athey	December 13, 1986	72
Mary V. Elswick	January 7, 1987	108
Virginia V.Rengers	January 12, 1987	108
Lillian P. Vass	March 2, 1987	24

On November 20, 1986, Persingers' directors authorized redemption of the 40 shares of the stock of Persingers owned

by Martha Brugh at a price of $220 per share.

24. In his letter dated December 13, 1986, Howard M Persinger, on behalf of himself as a shareholder and shareholders, Sylvia P. Lentz, Sarah P. Altizer, and Anna S. Athey, indicated that he was informed that the Board of Persingers had offered to purchase the shares of the Persinger Group and that the Persinger Group had until December 15, 1986, to accept or reject this offer. He stated that he and the other shareholders mentioned in his letter desired to continue to own their Persingers shares if the Persinger Group accepted the offer of the company to sell their shares; but, should the Persinger Group reject that offer and remain in the corporation, those shareholders wanted

out and accordingly requested the Board to offer to purchase their shares.

None of the shares of the Persinger Group were offered to Persingers pursuant to its offer of December 15, 1986.

25. At the annual meeting of the Persingers' Board of Directors held on March 7, 1987, the directors of Persingers voted to redeem at a price of $220 per share all of the shares listed above, except the Brugh shares which the Board had previously authorized to be redeemed in November, 1986. No notice of the proposed redemptions of stock by the directors was given to Thomas Persinger, a director of Persingers, or to the shareholders of Persingers. Thomas Persinger, however, was in attendance at the March 7 directors meeting and did not vote against these redemptions but

abstained because of prior discussions among the directors relating to the possible purchase by Persingers of the shares of Persingers owned by the Persinger Group.

26. As a consequence of the Brugh and March 7, 1987 redemptions, the number of outstanding shares of Persingers was reduced from 11,610 to 10,738, the percentage of the outstanding stock of Persingers owned by the Persinger Group increased from 16.12% to 17.43%, and the percentage of outstanding stock owned by First Huntington increased from 48.16% to 52.08%. However, as of March 7, 1987, or at any time thereafter, Carmazzi could have purchased from Wiles, his wife, children and aunt, the 740 shares of Persingers stock then owned by them at a price of $220 per share. The aggregate

of the shares owned by Wiles and his family, and the 40 shares owned by Carmazzi, constituted 72% of the outstanding shares of Persingers before any of the above-mentioned redemptions. Thus, in combination with the 48.16% of First Huntington held before these redemptions, Carmazzi owned or had available to him for purchase 54.88% of the outstanding shares of Persingers prior to any of the redemptions.

27. On March 7, 1987, Carmazzi procured an agreement from First Huntington whereby it granted to Carmazzi the right to purchase First Huntington's shares of Persingers at a price of $275 per share, subject to Carmazzi's ability to obtain financing. First Huntington agreed not to sell or agree to sell its shares to any other person for 45 days so

that Carmazzi would have adequate time to pursue financing for the transaction, and Carmazzi agreed to pursue the obtaining of adequate financing for the transaction actively and in good faith.

The negotiations between Carmazzi and First Huntington regarding this agreement were not disclosed to Thomas Persinger or to the shareholders of Persingers before or during the directors and shareholders meetings held on March 7, 1987. This agreement, by its terms, expired on April 21, 1987.

28. Carmazzi thereafter began negotiations with respect to his financing of such purchase with the National Bank of Commerce. In those negotiations the National Bank of Commerce indicated it would require purchase of 100% of the stock of

Persingers if it was to make the loan. Between March 9, 1987 and March 13, 1987, Carmazzi developed a financing plan, and on March 13, 1987 he submitted to the National Bank of Commerce a plan for financing and accomplishing the purchase. This plan provided for the purchase of First Huntington's Persingers shares and the purchase of the remaining outstanding shares of Persingers by means of a merger, and took into account that the shareholders of Persingers who objected to the merger would have dissenters' rights to have the fair market value of their shares determined by a court. This financing was not reduced to writing until April 9, 1987, at which time a loan-commitment letter was executed by the National Bank of Commerce. The financing was not consummated until the

execution by Carmazzi and the National Bank of Commerce of a Loan Agreement on April 17, 1987.

29. Pursuant to the Loan Agreement, the National Bank of Commerce agreed to lend up to a maximum of $1,800,000. To secure this loan the National Bank of Commerce required Carmazzi's personal guarantee and pledge of all the stock of Sales One, Sales Two and the Persingers stock owned by Sales One. To further secure the loan after consummation of the merger of Sales Two and Persingers, the Loan Agreement required that a first lien security interest be given to the National Bank of Commerce in substantially all of the assets of Persingers, subject to Persingers requirements for payment or its shareholders of the consideration due

them under the merger agreement or the fair market value of Persingers shares determined with respect to dissenters.

30. In order to implement the financing plan and plan of merger, Carmazzi, in mid-March, 1987, caused Sales One, a West Virginia corporation with its principal office in Charleston, West Virginia, to be formed. Carmazzi contributed to that corporation the 40 shares of Persingers stock owned by him at that time plus $1,000, receiving in exchange therefor all of the outstanding stock of Sales One. Thereafter, in early April, 1987 Sales One caused the formation of Sales Two, a West Virginia corporation with its principal office in Charleston, West Virginia. Sales Two was a wholly-owned subsidiary of Sales One.

31. On April 17, 1987, following execution of the Loan Agreement, Sales One and Sales Two jointly borrowed the sum of $1,537,800 from the National Bank of Commerce. Utilizing these loan proceeds, Sales One acquired all of First Huntington's Persingers shares. As a consequence Sales One, all of whose stock is owned by Carmazzi, acquired, including the 40 shares of Persingers stock owned by it, 52.45% of the issued and outstanding stock of Persingers.

32. Persingers requested Coopers & Lybrand to update its appraisal of the fair market value of a minority stock interest in Persingers. On or after March 27, 1987, Persingers received the updated Coopers & Lybrand appraisal, the purpose of which was for corporate planning, which determined that shares

constituting a minority interest in Persingers had a fair market value as of February 28, 1987 of $222 per share.

33. Thereafter, Carmazzi, through his corporations, Sales One and Sales Two, proposed to Persingers a merger agreement under the terms of which (a) Sales Two would be merged with and into Persingers, which would be the surviving corporation, and (b) each of the common shares of Persingers outstanding before consummation of the merger, other than the stock of Persingers owned by Sales One, would be converted into the right to receive $222 in cash.

34. Under the provisions of the merger agreement, and as required by West Virginia Code, §§ 31-1-122 and 123, the shareholders of Persingers are expressly permitted to dissent and object to the

merger and to obtain the fair value of their shares of Persingers, which fair value may be first determined by negotiations with the company, and second, upon failure of such negotiations, by judicial determination. Under West Virginia law, if fair value is determined in a judicial proceeding, dissenting shareholders receive judgment for the fair value of their shares, interest thereon from the date of the shareholders vote on the merger to the date of payment at a rate determined by the court to be fair and equitable, and may, in the court's discretion, receive reasonable compensation for experts employed by the dissenters if the fair value determined materially exceeds the amount offered by the corporation. Unless the dissenters' rejection of the

corporations' offer is vexatious or arbitrary or not in good faith, the cost and expenses of the proceeding are paid by the corporation.

35. On April 18, 1987, a notice was mailed to all Persingers directors informing them that a meeting would be held on April 27, 1987, to consider the Sales One and Sales Two offer. The notice was accompanied by a copy of the proposed merger agreement and a draft of the proxy statement to be sent to Persingers shareholders.

36. A directors meeting of Persingers was then held on April 27, 1987, at which time the resignation of Agee as a director of Persingers was accepted and William a. Tantlinger, a lawyer and social friend of Carmazzi was

elected to succeed Agee as director of Persingers.

37. Between April 17 and April 27, 1987, Carmazzi, Wiles, Morton, and Tantlinger met with Charles B. Stacy and David B. Shapiro, corporate counsel to Persingers, and discussed the merger proposal. These meetings were requested by those individuals to seek guidance on the merger. Tom Persinger did not attend these meetings.

38. At the same meeting of the Persingers Board of Directors held on April 27, 1987, the Board considered the merger agreement proposed by Sales One and Sales Two. At this 13-hour meeting, a majority of the directors of Persingers, with Carmazzi abstaining and Thomas Persinger dissenting, voted to recommend this merger to the shareholders

of Persingers. The minutes of this directors meeting reflect that the directors, in approving the merger, took into consideration the economic outlook and prospects for Persingers business and its shareholders, the alternatives of liquidation, sale to an ESOP, and sale of the business of Persingers to parties other than Carmazzi, the book value analysis presented to the meeting by Thomas Persinger and the valuation reports prepared by Coopers & Lybrand. It was noted that the Coopers and Lybrand reports had been prepared for general corporate purposes, did not take into account any proposed transaction, and did not constitute a fairness opinion. The Board determined that a fairness opinion was not necessary. After extensive discussion, the Board of Directors of

Persingers approved the merger agreement and determined to submit it to the shareholders of Persingers for their consideration.

39. On April 28, 1987, Persingers mailed a notice of a special shareholders' meeting called for May 19, 1987, to its shareholders. The purpose of the meeting was to consider and act upon the merger of Persingers and Sales Two. The notice of the meeting was accompanied by a proxy statement which described, among other things, the transaction and the dissenters' rights of the shareholders. The proxy statement included as an appendix the two appraisal reports of Coopers & Lybrand.

40. By letter dated May 5, 1987, to Carmazzi as President of Persingers, plaintiff, Southeast Bank, N.A.

(Southeast), expressed its opinion that $222 per share cash offer for its Persingers shares appeared to be low and indicated its desire to talk with Carmazzi about receiving a higher value for its shares.

41. On May 11, 1987, the plaintiffs, Southeast, a national banking association with its principal office in Bradenton, Florida, as Trustee under the Will of B. R. Williamson, deceased owner of 636 shares of the stock of Persingers, or 5.92% of the corporation's outstanding stock, and Joseph M. Persinger, a citizen of New Jersey, instituted this present action against defendants, Carmazzi, Wiles, Morton and Tantlinger, all citizens of West Virginia, and Sales One, Sales Two and Persingers.

42. In their complaint plaintiffs sought to enjoin the merger of Sales Two into Persingers and claimed damages of not less than $878,000. This Court refused to issue a temporary restraining order; and, notwithstanding the arguments of plaintiffs by their counsel, has, to date, refused to issue a preliminary or permanent injunction.

43. The meeting of the shareholders of Persingers called for May 19, 1987, was convened on that day. Without voting on the merger, that meeting was adjourned to be reconvened on May 29, 1987.

44. On May 21, 1987, Joseph M. Persinger, by counsel, offered to purchase: 1) all shares held by the defendants in this civil action, including the John A. Persinger bloc purchased by Carmazzi and Sales One from

First Huntington, for a cash price of $300 per share; and 2) to purchase from all other shareholders all shares which they wished to sell for a cash price of $300 per share. This offer was subject to two conditions: 1) that all of the defendants in this civil action would sell all of their shares to Joseph M. Persinger, and 2) that Joseph M. Persinger could obtain financing for his offer in the amount of $1,800,000 by noon on Tuesday, May 26, 1987. This offer was rejected by Carmazzi and Sales One on May 21, 1987. This offer was disclosed to the shareholders of Persingers.

45. On may 21, 1987, Sales One offered to sell its 5,592 shares of Persingers acquired from First Huntington to Persingers for a price of $275 per share. A meeting of the directors of

Persingers was called by Wiles and Morton for May 27, 1987, to consider the Sales One offer.

46. On May 26, 1987, Joseph M. Persinger and 1866 Holdings, Inc., a Delaware corporation, owned by Joseph M. Persinger and other members of the Meredith Persinger Group, offered to purchase the shares offered to Persingers by Sales One on May 2, 1987, for $285 per share. Subject to the condition that closing of the purchase and sale to Joseph M. Persinger and 1866 Holdings, Inc. of the said 5,592 shares from Persingers took place, Joseph M. Persinger and 1866 Holdings Inc. stated they would make a tender offer to all shareholders of Persingers to purchase their shares for $300 per share.

47. On May 27, 1987, Sales One amended its offer to sell its 5,592 shares to Persingers, conditioning that offer to prevent the resale of said shares to any member or entity representing the Meredith Persinger Group.

48. At the Persingers Directors meeting held on May 27, 1987, Wiles, Morton and Tantlinger, constituting a majority of the directors of Persingers, rejected the offer of Sales One to sell its 5,592 shares of Persingers. Since the directors determined to reject the Sales One offer, they did not consider the Joseph M. Persinger offer, which was conditioned upon purchase by Persingers of its stock offered by Sales One.

49. On May 29, 1987, at the reconvened meeting of shareholders, the

shareholders of Persingers voted to approve the merger of Sales Two into Persingers. Of the outstanding 10,738 shares of Persingers, holders of 68% thereof, or 7,032 shares, voted in favor of the merger, and holders of 31% thereof, or 3,328 shares, voted against the merger.

50. On or before the vote on the merger was taken at the Persingers shareholders meeting on May 28, 1987, Southeast, Joseph M. Persinger and all other members of the Meredith Persinger Group filed their written objection to the proposed merger; and, at the meeting, the plaintiffs in this action, and all other members of the Meredith Persinger Group voted against the merger. The plaintiffs and all other members of the

Meredith Persinger Group have dissented from the merger.

51. On May 29, 1987, the merger of Sales Two with and into Persingers was consummated.

52. As a result of the merger, Persingers is indebted to NBofC for the prior indebtedness of defendants Carmazzi and Sales One in an amount up to $1,800,000, and NBofC has a security interest in all of the assets of Persingers to secure the indebtedness in an amount up to $1,800,000.

53. As a result of the merger, plaintiffs Southeast and Joseph M. Persinger, and all other minority shareholders, have been terminated as shareholders of Persingers. The defendants, Carmazzi and Sales One, are the sole shareholders of Persingers

holding all of its shareholders equity worth approximately $1,100,000 at book value.

CONCLUSIONS OF LAW

1. Defendants, Carmazzi, Morton and Wiles, violated Persingers Bylaw Section 5.4 by negotiating for and entering into the January 9, 1987 agreement with First Huntington for the purchase of the John A. Persinger bloc of stock.

2. Defendant, Carmazzi, violated Persingers Bylaw Section 5.4 by negotiating for and entering into the March 7, 1987 agreement with First Huntington for the purchase of the John A. Persinger bloc.

3. Persingers Bylaw Section 5.4 was not validly repealed at the 1987 Annual Shareholders Meeting because

proper notice of the proposed shareholder action thereon was not given to the shareholders.

4. The selective redemption of 892 shares of Persingers at the 1987 Annual Directors Meeting was undertaken to convert the John A. Persinger bloc to majority control bloc in Persingers and was the first step in defendant Carmazzi's plan to take over Persingers.

5. The purchase of the John A. Persinger bloc by Carmazzi through Sales One violated the Persingers Bylaw Section 5.4.

6. The John A. Persinger bloc having been purchased in violation of Bylaw Section 5.4 was not lawfully held and could not lawfully be voted in favor of the merger between Sales One, Sales Two and Persingers; accordingly, the

merger was not approved by requisite majority vote.

7. The effect of the merger was equivalent to a sale of the assets of Persingers to defendant Carmazzi, the President and members of the Board of Directors of Persingers.

8. The consideration paid by Carmazzi for the assets of Persingers was inadequate.

9. The defendant directors failed to properly protect the interest of minority shareholders when they failed to consider and act upon the offer of Joseph M. Persinger and failed to reasonably explore the possibility of a sale of Persingers to anyone other than defendant Carmazzi.

10. Of particular significance in the whole scenario of events and the

actions taken by the company officials and stockholders is the role of defendant, Agee, who was acting on behalf of the company in his role as a Director during the period of time involved, or at least a part thereof, and also occupied the position as Executor of the Estate of John A. Persinger, with the burden on him of preserving and procuring the best price for the stocks as required of one in a fiduciary relationship. The Court finds these actions to be improper and cannot in good conscience be approved.

In accordance with the foregoing Findings of Fact and Conclusions of Law, the Court is of the opinion that the merger should be rescinded.

The Clerk is directed to mail certified copies of this Memorandum Opinion to counsel of record herein.

DATED: January 5, 1989

/s/Dennis R. Knapp
Judge

ENTERED: DECEMBER 29, 1988

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

SOUTHEAST BANK, N.A., and JOSEPH M. PERSINGER, on behalf of themselves and all other shareholders of Persingers Incorporated,

Plaintiffs,

Vs. Civil Action No. 2:87-0462

R. FRANK CARMAZZI, SALES ONE, INC., SALES TWO, INC., JOHN C. MORTON, W. GUY WILES, JR., WILLIAM A. TANTLINGER, ESQ., PERSINGERS INCORPORATED, WILLIAM F. AGEE, and FIRST HUNTINGTON NATIONAL BANK, N.A.,

Defendants.

O R D E R

In accordance with the Court's Memorandum Opinion, including findings of Fact and Conclusions of Law to be later filed herein, the Court has concluded to grant the relief sought by plaintiffs.

In view of the fact that there existed major disagreements and disruption in the control and management of the business that is the subject of this litigation, there was created a duty on the part of those in management (the officers) and the stockholders to engage in ethical practices and strict compliance with banking practices, regulations and applicable law. This is particularly so in consideration of the previous action of the Board of Directors in enacting an amendment to the Bylaws of the Company which had for its purpose the prevention of the very action here taken and of which plaintiffs complain in this action.

While it may well be, as defendants contend, that at the general annual meeting of the stockholders specific

notice of proposals to be considered at such a meeting is not ordinarily required, here however the action in repealing the specific amendment above mentioned was violative of ethical standards and prudent business practices and should not be condoned.

In a matter of this significance and one which led to a change in control of the company, equity and fairness dictate that notice to all stockholders of the proposal to be presented for action by them should have been published. Failure so to do could have, and likely did, result in a change in the corporate structure of the business and the management thereof without affording all interested stockholders an opportunity to participate in an action of such magnitude, and likely of vital concern to

a number of stockholders, and which may very well have operated to their detriment. At least they were entitled to be informed of any proposed action that significantly altered the interest and monetary considerations of longstanding stockholders and managers.

It is unconscionable that the action taken by the stockholders and directors should be approved. The further action of the stockholders and directors assembled therefore is a nullity and cannot stand. Therefore, it is ORDERED that the acts authorized and the acts promulgated thereunder be rescinded and held for naught.

Realizing the impact of this order upon the corporation itself and the individuals involved therewith, the Court is of the opinion that a stay of the

operation of the same should be granted to permit the parties in interest the opportunity to perfect an appeal or take such action as they deem appropriate.

The Clerk is directed to mail certified copies of this order to counsel of record herein.

DATED: December 29, 1988

/s/Dennis R. Knapp
Judge

FILED: JULY 15, 1988

UNITED STATE COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-1109

SOUTHEAST BANK, N.A.; JOSEPH M. PERSINGER, on behalf of themselves and all other shareholders of Persingers Incorporated, a West Virginia corporation

Plaintiffs-Appellants

v.

R. FRANK CARMAZZI, SALES ONE, INC., a West Virginia corporation; SALES TWO, INC., a West Virginia corporation; JOHN C. MORTON; W. GUY WILES, JR.; WILLIAM A. TANTLINGER; PERSINGERS INCORPORATED, a West Virginia corporation; FIRST HUNTINGTON NATIONAL BANK, N.A.; WILLIAM F. AGEE

Defendants-Appellees

Appeal from the United States District Court for the Southern District of West Virginia at Charleston

---

Upon agreement of the parties,

IT IS ORDERED that the appeal in this case be dismissed pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure

IT IS FURTHER ORDERED that a certified copy of this order be issued to the Clerk, U.S. District Court as and for the mandate.

/s/ John M. Greacen
CLERK

ENTERED: JULY 18, 1988

ENTERED: JUNE 28, 1988

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

SOUTHEAST BANK, N.A., and
JOSEPH M. PERSINGER, etc.,

Plaintiffs,

Vs. Civil Action No. 2:87-0462

R. FRANK CARMAZZI, et al.,

Defendants.

O R D E R

This matter is pending on the motion of defendants, R. Frank Carmazzi, Sales One, Inc., Sales Two, Inc., John C. Morton, W. Guy Wiles, Jr., William A. Tantlinger, Persingers Incorporated, and William F. Agee, to amend their joint answer to plaintiffs' first amended complaint to include a statute of limitations defense based upon a recent appellate decision. Perceiving no undue prejudice to the plaintiffs and in the

interest of justice, the Court is of the opinion that said motion should be granted.

Accordingly, it is hereby ORDERED that the amended answer be filed.

The Clerk is directed to mail certified copies of this order to counsel of record herein.

DATED: June 28, 1988

/s/ Dennis R. Knapp
Judge

ENTERED: APRIL 12, 1988

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

SOUTHEAST BANK, N.A., and JOSEPH M. PERSINGER, on behalf of themselves and all other shareholders of Persingers Incorporated, a West Virginia corporation,

Plaintiffs,

Vs. Civil Action No. 2:87-0462

R. FRANK CARMAZZI, SALES ONE, INC., SALES TWO, INC., JOHN C. MORTON, W. GUY WILES, JR., WILLIAM A. TANTLINGER, ESQ., and PERSINGERS INCORPORATED, a West Virginia corporation,

Defendants.

O R D E R

This matter is presently pending before the Court on several motions to be herein addressed.

Plaintiffs seek to amend their complaint by adding as party defendants William T. Agee and The 1st Huntington

National Bank. Although never presented as parties herein, these names are not foreign to this action. The original complaint is replete with allegations against Mr. Agee as an employee of The 1st Huntington National Bank. Given the liberal approach taken by the courts in permitting amendments, the Court is of opinion that the motion to amend should be granted and defendant should file their responsive pleadings within thirty (30) days from the date of service of said complaint.

Plaintiffs are requesting to maintain this civil action as a class action and to certify the class. As a prerequisite to making such a determination, Rule 23(a)(1) requires a finding that the class is so numerous that joinder of all its members would be

impractical. The present case involves a dispute with respect to a cash-out merger of a small closely-held corporation. The potential plaintiffs herein are 35 shareholders who reside, for the most part, in West Virginia and a large percentage of who are related to the Persinger family. Furthermore, 22 of the 35 have already opted to accept the merger price and thereby have relinquished their stock, thus leaving as only nine Persinger family members and two other shareholders to pursue this action.

Accordingly, the Court finds that plaintiffs have failed to meet the requirement of numerosity of class members and declines to certify this case as a class action.

Finally, plaintiffs have requested that the court require defendants to establish a trust in which to deposit moneys due and owing plaintiffs in the event of a buy-out of plaintiffs' corporate stock. Plaintiffs have failed as of this date to show that defendants would be unable to satisfy the amount owed to the remaining shareholders. However, while the establishment of a trust is not indicated at this time, the Court is considering some mechanism to monitor the financial condition of the company at quarterly periods to afford the shareholders some measure of security. Furthermore, the Court recognizes plaintiffs' concerns with respect to the financial condition of the corporation and will entertain a renewed

motion for establishment of a trust should future events so indicate.

It is further ORDERED that the following time table be established in this action:

1. Discovery shall be completed by September 12, 1988.

2. Dispositive motions with briefs shall be filed by September 22, 1988; responses by September 26, 1988; and replies by October 3, 1988.

3. A hearing on said motions shall be conducted on October 24, 1988, at 2:30 p.m.

4. A final pretrial/settlement conference shall be conducted on November 7, 1988, at 2:00 p.m.

5. Trial shall commence on November 14, 1988, at 9:30 a.m.

The Clerk is directed to mail certified copies of this order to counsel of record herein.

DATED: April 12, 1988

/s/ Dennis R. Knapp
Judge

ENTERED: JULY 17, 1987

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

AT CHARLESTON

SOUTHEAST BANK, N.A., and
JOSEPH M. PERSINGER, on behalf
of themselves and all other
shareholders of Persingers
Incorporated, a West Virginia
corporation,

Plaintiffs,

Vs. Civil Action No. 2:87-0462

R. FRANK CARMAZZI, SALES
ONE, INC., a West Virginia
corporation, SALES TWO, INC.,
a West Virginia corporation,
JOHN C. MORTON, W. GUY WILES,
JR., WILLIAM A. TANTLINGER,
ESQ., and PERSINGERS INCORPORATED,
a West Virginia corporation,

Defendants.

O R D E R

For good cause shown, it is hereby ORDERED that the time in which defendants must file their brief herein is extended to July 22, 1987, and the time for submission of a reply brief by the

plaintiffs shall be July 29, 1987. It is further ORDERED that the date for the argument in this case originally scheduled for July 20, 1987, shall be postponed to a date that is mutually convenient to the Court and counsel for the parties.

ENTERED: _____

/s/ Dennis R. Knapp
Judge

Approved by:

/s/ J. W. Riccardi
Counsel for Plaintiffs

/s/ Robert K. Emerson

/s/ David A. Faber/dbs
Counsel for Defendants

ENTERED: JUNE 17, 1987

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

SOUTHEAST BANK, N.A. and
JOSEPH M. PERSINGER, on behalf
of themselves and all other
shareholders of Persingers
Incorporated, a West Virginia
Corporation,

Plaintiffs,

Vs. Civil Action No. 2:87-0462

R. FRANK CARMAZZI, et al.,

Defendants.

O R D E R

For reasons appearing to the Court, it is hereby ORDERED in this action as follows:

1. The complete transcript will be filed by June 19, 1987;

2. Plaintiffs' brief, together with findings of fact and conclusion of law, will be due by July 2, 1987;

3. Defendants' brief, together with findings of fact and conclusions of law, will be due by July 13, 1987;

4. Reply briefs will be due by July 15, 1987; and

5. Argument thereon will be heard on July 20, 1987, at 2:00 p.m., in the Court's chambers.

The Clerk is directed to mail certified copies of this order to counsel of record herein.

DATED: June 17, 1987

/s/ Dennis R. Knapp
Judge

ENTERED: MAY 19, 1987

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

AT CHARLESTON

SOUTHEAST BANK, N.A., and
JOSEPH M. PERSINGER, on behalf
of themselves and all other
shareholders of Persingers
Incorporated, a West Virginia
corporation,

Plaintiffs,

Vs. Civil Action No. 2:87-0462

R. FRANK CARMAZZI, SALES
ONE, INC., a West Virginia
corporation, SALES TWO, INC.,
a West Virginia corporation,
JOHN C. MORTON, W. GUY WILES,
JR., WILLIAM A. TANTLINGER,
ESQ., and PERSINGERS INCORPORATED,
a West Virginia corporation,

Defendants.

O R D E R

On the 15th day of May 1987, there came the plaintiffs, by their attorneys, John E. Lutz, Jr., and J. W. Riccardi, and came also the defendants R. Frank Carmazzi, Sales One, Inc., a West

Virginia corporation, and Sales Two, Inc., a West Virginia corporation, by their attorney, Robert K. Emerson, and came also the defendant Persingers Incorporated, by David A. Faber, its attorney, to a hearing on plaintiffs' motion for a temporary restraining order. After hearing the arguments of counsel, and all other matters adduced on behalf of the parties, upon joint motion of said parties, it is considered and ordered by the Court as follows:

(1) No temporary restraining order will issue; therefore, the plaintiffs will not be required at this time to give security as required by Rule 65(c), Federal Rules of Civil Procedure.

(2) Plaintiffs' motions for a preliminary injunction and a permanent injunction are advanced on the docket of

this Court, consolidated and set for consolidated trial beginning on Wednesday, May 20, 1987, at 10:00 a.m.

(3) Defendants will cause the special meeting of the shareholders of Persingers Incorporated presently scheduled for May 19, 1987, to be called to order and then adjourned to the 29th day of May 1987, at which time, unless the Court orders otherwise, the pending merger between said corporation and the defendant, Sales Two, Inc., will be voted upon by the shareholders of Persingers Incorporated. The shareholders of Persingers Incorporated shall have until said shareholders' meeting on May 29, 1987, to file with the corporation dissents to the pending merger. Except as may be necessary to call to order the special meeting of shareholders scheduled

for May 19, 1987, and to determine whether a quorum is present by examining proxies filed and adjourn said meeting to May 29, 1987, Defendants R. Frank Carmazzi and Sales One, Inc., shall not, prior to May 29, 1987, vote any shares of Persingers Incorporated owned by them respectively, or cause any meeting of the shareholders of Persingers Incorporated to be called prior to said date.

ENTER this 19th day of May 1987.

/s/ Dennis R. Knapp
U.S. District Judge

PRESENTED BY:

/s/ David A. Faber
David A. Faber
SPILMAN, THOMAS, BATTLE,
& KLOSTERMEYER
Post Office Box 273
Charleston, WV 25321

Counsel for Persingers Incorporated

INSPECTED BY:

/s/ Robert K. Emerson
Robert K. Emerson
CAMPBELL, WOODS, BAGLEY,
EMERSON, McNEER & HERNDON
Post Office Box 1835
Huntington, WV 25719

Counsel for Defendants, R. Frank Carmazzi, Sales One, Inc., and Sales Two, Inc.

/s/ John E. Lutz
John E. Lutz
DODSON, RICCARDI & LUTZ
Laidley Tower, Suite 1111
500 Lee Street, E.
Charleston, WV 25301

CONSTITUTION OF THE UNITED STATES

[Amendment V]

(Rights of Accused in Criminal Proceedings)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

WEST VIRGINIA CODE OF 1931
(as amended 7/1/74)

§31-1-19. Notice of shareholders' or members' meetings.

Unless otherwise provided in the bylaws, written notice stating the place, day and hour of the meeting and, in case of a special meeting, the purpose of purposes for which the meeting is called, shall be delivered not less than ten nor more than fifty days before the date of the meeting, either personally or by mail, by or at the direction of the president, the secretary, or the officer or persons calling the meeting, to each shareholder of record or member entitled to vote at such meeting. If mailed, such notice shall be deemed to be delivered when deposited in the United States mail addressed to the shareholder or member at this address as it appears on the

corporate records, with postage thereon prepaid. (Code 1849, c. 57; Code 1860, c. 57; 1863, c. 83; 1866, c. 111; 1868, c. 53, §§ 41, 42; c. 54, § 23; 1875, c. 63; 1881, c. 17; 1882, cc. 96, 97; 1901, c. 35; Code 1923, c. 53, §§ 41, 42, 51; c. 54, § 23; 1945, c. 29; 1959, c. 20; 1967, c. 105; 1974, c. 13; 1975, c. 118.)

§ 31-1-22. Vacancies in board of directors; manner of filling.

Any vacancy occurring in the board of directors and any directorship to be filled by reason of an increase in the number of directors may be filled by the affirmative vote of a majority of the remaining directors, though less than a quorum of the board of directors, unless the articles of incorporation or the bylaws provide that a vacancy or directorship so created shall be filled

in some other manner, in which case such provision shall control.

A director elected or appointed, as the case may be, to fill a vacancy shall be elected or appointed for the unexpired term of his predecessor in office.

Any directorship to be filled by reason of an increase in the number of directors may be filled by the board of directors for a term of office continuing only until the next election of directors. (1974, c. 13.)

§ 31-1-24. Place and notice of directors' meetings.

(a) Meetings of the board of directors, regular or special, may be held either within or without this State.

(b) Regular meetings of the board of directors may be held with or without notice as prescribed in the bylaws. Special meetings of the board of

directors shall be held upon such notice as is prescribed in the bylaws except that notice shall be required to be given to every director when the meeting is being called for the purpose of amending the bylaws or for the purpose of authorizing the sale of all or substantially all of the assets of the corporation, in which case such notice shall set forth the nature of the business intended to be transacted.

(c) Attendance of a director at a meeting shall constitute a waiver of notice of such meeting, except where a director attends a meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened. Except as provided in subsection (b) of this section, neither

the business to be transacted at, nor the purpose of, any regular or special meeting of the board of directors need be specified in the notice or waiver of notice of such meeting unless required by the bylaws. (Code 1849, c. 57; Code 1860, c. 57; 1863, c. 83; 1866, c. 111; 1868, c. 53, §§ 41, 42; c. 54; § 23; 1875, c. 63; 1881, c. 17; 1882, cc. 96, 97; 1901, c. 35; Code 1923, c. 53; §§41, 42, 51; c. 54, §23; 1945, c. 29; 1959, c. 20; 1967, c. 105; 1974, c. 13.)

§ 31-1-34. Procedure for merger.

Any two or more domestic corporations, whether stock or nonstock,or whether or not organized for profit, may merge into one of such corporations, irrespective of whether the surviving corporation is a stock or nonstock corporation and irrespective of

whether or not it is organized for profit, pursuant to a plan of merger approved in the manner provided in this article.

The board of directors of each corporation shall, by resolution adopted by each such board, approve a plan of merger setting forth:

(a) The names of the corporations proposing to merge, and the name of the corporation into which they propose to merge.

(b) The terms and conditions of the proposed merger.

(c) The manner and basis of converting the shares of each corporation into shares, obligations or other securities of the surviving corporation or of any other corporation or, in whole or in part, into cash or other property.

(d) A statement of any changes in the articles of incorporation of the surviving corporation to be effected by such merger.

(e) Such other provisions with respect to the proposed merger as are deemed necessary or desirable. (1931 Code, § 31-1-63; 1933, c. 15; 1937, c. 19; 1967, c. 105; 1969, c. 19; 1971, c. 18; 1974, c. 13.)

§31-1-36. Articles of merger or consolidation; filing; issuance of certificate; recordation; admission in evidence.

(a) Upon approval by the shareholders or members in accordance with the provisions of section one hundred seventeen or section one hundred fifty [§ 31-1-117 or 31-1-150] of this article, whichever is applicable, the articles of merger or articles of

consolidation shall be executed in duplicate by each corporation by its president or a vice president and by its secretary or an assistant secretary, and verified by one of the officers of each corporation signing such articles.

(b) Duplicate originals of the articles of merger or articles of consolidation shall be delivered to the secretary of state. If the secretary of state finds that such articles conform to law, he shall, when all fees have been paid as prescribed by law, (i) endorse on each of such duplicate originals the word "Filed," and the month, day and year of the filing thereof; (ii) file one of such duplicate originals in his office; and (iii) issue a certificate of merger or a certificate of consolidation to which he shall affix the other duplicate original.

The certificate of merger or certificate of consolidation, together with the duplicate original of the articles of merger or articles of consolidation affixed thereto by the secretary of state, shall be returned to the surviving or new corporation, as the case may be or its representative.

(c) The certificate of merger or certificate of consolidation, or certified copy thereof, shall be recorded in the office of the appropriate county clerk in the same manner as original certificates of incorporation are required to be recorded, in accordance with the provisions of subsection (b) of section twenty-eight [§ 31-1-28] of this article and received in evidence to the same extent as an original certificate of incorporation or a certified copy of such

original. (1931 Code, § 31-1-63; 1933, c. 15; 1937, c. 19; 1967, c. 105; 1969, c. 19; 1971, c. 18; 1974, c. 13; 1975, c. 118.)

§ 31-1-37. Effect of merger or consolidation; conveyance of title to real estate in State to surviving or new corporation.

(a) Upon the issuance of the certificate of merger or the certificate of consolidation by the secretary of state, the merger or consolidation shall be effected. When such merger or consolidation has been effected:

(1) The several corporations parties to the plan of merger or consolidation shall be a single corporation, which, in the case of a merger, shall be that corporation designated in the plan of merger as the surviving corporation, and, in the case of a consolidation, shall be

the new corporation provided for in the plan of consolidation.

(2) The separate existence of all corporations parties to the plan of merger or consolidation, except the surviving or new corporation, shall cease.

(3) Such surviving or new corporation shall have all the rights, privileges, immunities and powers and shall be subject to all the duties and liabilities of a corporation organized under this article.

(4) Such surviving or new corporation shall thereupon and thereafter possess all the rights, privileges, immunities and franchises, of a public as well as of a private nature, of each of the merging or consolidating corporations; and all property, real,

personal and mixed, and all debts due on whatever account, including subscriptions to shares, if any, and all other choses in action, and all and every other interest of or belonging to or due to each of the corporations so merged or consolidated, shall be taken and deemed to be transferred to and vested in such single corporation without further act or deed; and the title to any real estate, or any interest therein, vested in any such corporations shall not revert or be in any way impaired by reason of such merger or consolidation.

(5) Such surviving or new corporation shall henceforth be responsible and liable for all the liabilities and obligations of each of the corporations so merged or consolidated; and any claim existing or

action or proceeding pending by or against any of such corporations may be prosecuted as if such merger or consolidation had not taken place, or such surviving or new corporations may be substituted in its place. Neither the rights of creditors nor any liens upon the property of any such corporation shall be impaired by such merger or consolidation.

(6) In the case of a merger, the articles of incorporation of the surviving corporation shall be deemed to be amended to the extent, if any, that changes in its articles of incorporation are stated in the plan of merger; and, in the case of a consolidation, the statements set forth in the articles of consolidation and which are required or permitted to be set forth in the articles

of incorporation of corporations organized under this article shall be deemed to be the original articles of incorporation of the new corporation.

(b) In any merger or consolidation of corporations under the laws of the state of West Virginia, any constituent corporation thereof owning or holding real estate in West Virginia shall further evidence the title thereto in the surviving or new corporation by executing and acknowledging for record a confirmatory deed or deeds to the respective parcels of real estate, which deed or deeds shall be recorded in the office of the clerks of the county courts of the respective counties in which such real estate is situated; and such deed or deeds shall recite as the consideration therefor the said merger or consolidation

and shall be deemed confirmatory of the title of such real estate in the surviving or new corporation. (1931 Code, § 31-1-63; 1933, c. 15; 1937, c. 19; 1967, c. 105; 1969, c. 19; 1971, c. 18; 1974, c. 13.)

§31-1-83. Rights of corporation to acquire and dispose of its own shares.

Subject to the provisions of chapter thirty-one-a [§ 31A-1-1 et seq.] of this Code and unless otherwise prohibited by law, a corporation shall have the right to purchase, take, receive or otherwise acquire, hold, own, pledge, transfer or otherwise dispose of its own shares, but purchases of its own shares, whether direct or indirect, shall be made only to the extent of unreserved and unrestricted earned surplus available therefor, and, if the articles of incorporation so

permit or with the affirmative vote of the holders of a majority of all shares entitled to vote thereon, to the extent of unreserved and unrestricted capital surplus available therefor.

To the extent that earned surplus or capital surplus is used as the measure of the corporation's right to purchase its own shares, such surplus shall be restricted so long as such shares are held as treasury shares, and upon the disposition or cancellation of any such shares the restriction shall be removed pro tanto.

Notwithstanding the foregoing limitation, a corporation may purchase or otherwise acquire its own shares for the purpose of:

(a) Eliminating fractional shares.

(b) Collecting or compromising indebtedness to the corporation.

(c) Paying dissenting shareholders entitled to payment for their shares under the provisions of this article.

(d) Effecting, subject to the other provisions of this article, the retirement of its redeemable shares by redemption or by purchase at not to exceed the redemption price.

No purchase of or payment for its own shares shall be made at a time when the corporation is insolvent or when such purchase or payment would make it insolvent. (1974, c.13.)

§ 31-1-122. Right of shareholders to dissent.

Any shareholder of a corporation shall have the right to dissent from any of the following corporate actions:

(a) Any plan of merger or consolidation to which the corporation is a party; or

(b) Any sale or exchange of all or substantially all of the property and assets of the corporation not made in the usual and regular course of its business, including a sale in dissolution, but not including a sale pursuant to an order of a court having jurisdiction in the premises or a sale for cash on terms requiring that all or substantially all of the net proceeds of sale be distributed to the shareholders in accordance with their respective interests within one year after the date of sale.

A shareholder may dissent as to less than all of the shares registered in his name. In that event, his rights shall be

determined as if the shares as to which he has dissented and his other shares were registered in the names of different shareholders. (1974, c. 13.)

§ 31-1-123. Rights of dissenting shareholders; procedure for purchasing of dissenting shareholders' shares; civil action for determining value of shares; procedure for transferring of such shares to corporation and payment therefor.

(a) Any shareholder electing to exercise his right to dissent, pursuant to section one hundred twenty-two [§ 31-1-122] of this article, shall file with the corporation, prior to or at the meeting of shareholders at which such proposed corporate action is submitted to a vote, a written objection to such proposed corporate action. If such proposed corporate action be approved by the required vote and such shareholder

shall not have voted in favor thereof, such shareholder may, within ten days after the date on which the vote was taken or if a corporation is to be merged without a vote of its shareholders into another corporation, any of its shareholders may, within fifteen days after the plan of such merger shall have been mailed to such shareholders, make written demand on the corporation, or, in the case of a merger or consolidation, on the surviving or new corporation, domestic or foreign, for payment of the fair value of such shareholder's shares, and, if such proposed corporate action is effected, such corporation shall pay to such shareholder, upon surrender of the certificate or certificates representing such shares, the fair value thereof as of the day prior to the date on which the

vote was taken approving the proposed corporate action, excluding any appreciation or depreciation in anticipation of such corporate action. Any shareholder failing to make demand within the ten-day period shall be bound by the terms of the proposed corporate action. Any shareholder making such demand shall thereafter be entitled only to payment as in this section provided and shall not be entitled to vote or to exercise any other rights of a shareholder.

(b) No such demand may be withdrawn unless the corporation shall consent thereto. If, however, such demand shall be withdrawn upon consent, or if the proposed corporate action shall be abandoned or rescinded or the shareholders shall revoke the authority

to effect such action, or if, in the case of a merger, on the date of the filing of the articles of merger the surviving corporation, is the owner of all of the outstanding shares of the other corporations, domestic and foreign, that are parties to the merger, or if no demand or petition for the determination of fair value by a court of general civil jurisdiction have been made or filed within the time provided in subsection (e) of this section, or if a court of general civil jurisdiction shall determine that such shareholder is not entitled to the relief provided by this section, then the right of such shareholder to be paid the fair value of his shares shall cease and his status as a shareholder shall be restored, without prejudice to any corporate proceedings

which may have been taken during the interim.

(c) Within ten days after such corporate action is effected, the corporation, or, in the case of a merger or consolidation, the surviving or new corporation, domestic or foreign, shall give written notice thereof to each dissenting shareholder who has made demand as herein provided, and shall make a written offer to each shareholder to pay for such shares at a specified price deemed by such corporation to be fair value thereof. Such notice and offer shall be accompanied by a balance sheet of the corporation the shares of which the dissenting shareholder holds, as of the latest available date and not more than twelve months prior to the making of such offer, and a profit and loss

statement of such corporation for the twelve months' period ended on the date of such balance sheet.

(d) If within thirty days after the date on which such corporate action is effected the fair value of such shares is agreed upon between any such dissenting shareholder and the corporation, payment therefor shall be made within ninety days after the date on which such corporate action was effected, upon surrender of the certificate or certificates representing such shares. Upon payment of the agreed value the dissenting shareholder shall cease to have any interest in such shares.

(e) If within such period of thirty days, a dissenting shareholder and the corporation do not so agree, then the corporation shall within thirty days

after receipt of written demand from any dissenting shareholder, which written demand must be given within sixty days after the date on which such corporate action was effected, file a complaint in a court of general civil jurisdiction requesting that the fair value of such shares be found and determined, or the corporation may file such complaint at any time within such sixty-day period at its own election. Such complaint shall be filed in any court of general civil jurisdiction in the county in which the principal office of the corporation is situated, or, if there be no such office in this State, in the county in which any dissenting shareholder resides or is found or in which the property of such corporation, or any part of it, may be. If the corporation shall fail to

institute such proceedings, any dissenting shareholder may do so in the name of the corporation. All dissenting shareholders wherever residing, may be made parties to the proceedings as an action against their shares quasi in rem. A copy of the complaint shall be served on each dissenting shareholder who is a resident of this State in the same manner as in other civil actions. Dissenting shareholders who are nonresidents of this State shall be served a copy of the complaint by registered or certified mail, return receipt requested. In addition, service upon such nonresident shareholders shall be made by publication, as provided in Rule 4(e)(2) of the West Virginia Rules of Civil Procedure. All shareholders who are parties to the proceeding shall be

entitled to judgment against the corporation for the amount of the fair value of their shares. The court may, if it so elects, appoint one or more persons as appraisers to receive evidence and recommend a decision on the question of fair value. The appraisers shall have such power and authority as shall be specified in the order of their appointment or any subsequent appointment. The judgment shall be payable only upon and concurrently with the surrender to the corporation of the certificate or certificates representing such shares. Upon payment of the judgment, the dissenting shareholder shall cease to have any interest in such shares.

The judgment shall include an allowance for interest at such rate as

the court may find to be fair and equitable in all the circumstances, from the date on which the vote was taken on the proposed corporate action to the date of payment.

The costs and expenses of any such proceeding shall be determined by the court and shall be assessed against the corporation, but all or any part of such costs and expenses may be apportioned and assessed as the court may deem equitable against any or all of the dissenting shareholders who are parties to the proceeding to whom the corporation shall have made an offer to pay for the shares if the court shall find that the action of such shareholders in failing to accept such offer was arbitrary or vexatious or not in good faith. Such expenses shall include reasonable compensation for and

reasonable expenses of the appraisers, but shall exclude the fees and expenses of counsel for and experts employed by any party; but if the fair value of the shares as determined materially exceeds the amount which the corporation offered to pay therefor, or if no offer was made, the court in its discretion may award to any shareholder who is a party to the proceeding such sum as the court may determine to be reasonable compensation to any expert or experts employed by the shareholder in the proceeding. Any party to the proceeding may appeal any judgment or ruling of the court as in other civil cases.

(f) Within twenty days after demanding payment for his shares, each shareholder demanding payment shall submit the certificate or certificates

representing his shares to the corporation for notation thereon that such demand has been made. His failure to do so shall, at the option of the corporation, terminate his rights under this section unless a court of general civil jurisdiction, for good and sufficient cause shown, shall otherwise direct. If shares represented by a certificate on which notation has been so made shall be transferred, each new certificate issued therefor shall bear similar notation, together with the name of the original dissenting holder of such shares, and a transferee of such shares shall acquire by such transfer no rights in the corporation other than those which the original dissenting shareholder had after making demand for payment of the fair value thereof.

(g) Shares acquired by a corporation pursuant to payment of the agreed value therefor or to payment of the judgment entered therefor, as in this section provided, may be held and disposed of by such corporation as in the case of other treasury shares, except that, in the case of a merger or consolidation, they may be held and disposed of as the plan of merger or consolidation may otherwise provide. (1974, c. 13.)

PERSINGERS INCORPORATED BYLAWS (3/1/86)

Section 5.4 Purchase of Stock.

(a) It is the policy of this corporation to purchase, for corporate purposes, any shares of the capital stock of this corporation that may be available for purchase, from time to time, if the Board of Directors shall determine in each case that the price and terms of sale are acceptable and that the cash situation of the corporation warrants such purchase.

(b) No officer or director of this corporation shall negotiate for the purchase of shares of the capital stock of this corporation from any shareholder, either on behalf of the corporation or

otherwise, and the Board of Directors shall not authorize the purchase of any shares of the capital stock of this corporation from any shareholder, unless there shall be disclosed to the selling shareholder all material facts relevant at such time to the determination of the fair value of such shares, including annual financial reports, audited or unaudited, for the past five years, the latest unaudited financial reports, and any information known to the management of the corporation which is material to a determination of the value of the capital stock of the corporation.

(c) Any officer or director of this corporation who shall receive

an offer from a shareholder of this corporation to sell any of the shares of the capital stock of this corporation owned by such shareholder or by any other person, or who shall in any manner be informed that a shareholder of the corporation desires to sell any shares of the capital stock of the corporation, shall forthwith notify the Board of Directors of such offer or desire to sell.

(d) No officer or director of this corporation shall purchase any shares of the capital stock of this corporation from any other shareholder unless the corporation shall first have the opportunity, after notice to and authorization by the Board of Directors, to purchase

such shares at the same price and upon equivalent terms, and the Board of Directors shall determine that it is not in the best interests of the corporation at such time to purchase such shares at such price and on such terms.

(e) Any officer or director of this corporation who negotiates with any shareholder of the corporation for the purchase of any shares of the capital stock of the corporation shall be deemed to be negotiating on behalf of the corporation, but shall not have the power to bind the corporation in the absence of specific authorization by the Board of Directors; and any officer or director who shall purchase any shares of the capital stock of this

corporation without complying with this Section 5.4 shall be conclusively deemed to have purchased such shares on behalf of the corporation, and upon tender by the corporation of the purchase price of such shares shall, upon approval of such purchase on behalf of the corporation by the Board of Directors, forthwith deliver the certificate or certificates representing the same to the corporation.

(f) Any shares of its capital stock acquired by this corporation may be held as treasury stock or returned to the status of authorized but unissued stock, as the Board of Directors may determine, and, in the absence of any such determination,

shall be held as treasury shares. Any shares of capital stock so acquired may thereafter be sold or disposed of as the Board of Directors shall determine.

(g) The provisions of this Section 5.4 shall not apply to any transfer of shares of the capital stock of this corporation, with or without valuable consideration, between a shareholder and his or her spouse, lineal antecedents or descendants, or brother or sister, or any transfer pursuant to testamentary or intestate succession.

Supreme Court, U.S.
FILED
DEC 9 1994
OFFICE OF THE CLERK

(3)

No. 94-869

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

JOSEPH M. PERSINGER, - - - - Petitioner,

versus

R. FRANK CARMAZZI,
SALES ONE, INC.,
SALES TWO, INC.,
JOHN C. MORTON,
W. GUY WILES, JR.,
WILLIAM A. TANTLINGER, Esq.,
PERSINGERS INCORPORATED,
WILLIAM F. AGEE and
BANK ONE, HUNTINGTON, WEST VIRGINIA, N.A. (Formerly, The First Huntington National Bank, N.A.) - Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDWARD M. KOWAL
Counsel of Record
CHERYL LYNNE CONNELLY
CAMPBELL, WOODS, BAGLEY, EMERSON, MCNEER & HERNDON
P.O. Box 1835
Huntington, WV 25719
(304) 529-2391

DANIEL J. KONRAD
HUDDLESTON, BOLEN, BEATTY, PORTER & COPEN
611 Third Avenue
Huntington, WV 25701
(304) 529-6181

WESTERFIELD-BONTE CO., 619 W. KENTUCKY–P.O. BOX 3251, LOUISVILLE, KY.

25 pp

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
STATUTES INVOLVED	1
STATEMENT OF THE CASE	2
MISSTATEMENTS OF FACT AND LAW BY PETITIONER	7
SUMMARY OF ARGUMENT	8
ARGUMENT	9
I. The Findings of Fact Enumerated by Judge Knapp in His Rescission Ruling and the Findings of Fact Certified to the West Virginia Supreme Court of Appeals Are Identical in All Material Respects	9
II. Petitioner Was Not Denied Due Process	10
A. The Reopening of the Rescission Ruling Was Prompted by Judge Knapp	11
B. The District Court Retained Power Over the Rescission Ruling	13
C. Any Allegations of a Denial of Procedural Due Process Should Not be Used to Avoid the Clear Pronunciations of West Virginia's Highest Court	14
III. The Answers of the West Virginia Supreme Court of Appeals to the Certified Questions Were Binding on the Fourth Circuit	16
IV. Issues Which Petitioner Has Raised for the First Time in His Petition Should Not be Given Consideration by This Court	20
A. Petitioner Failed to Assert Before the Circuit Court Below That It Was Improper for It to Certify Issues to the West Virginia Supreme Court of Appeals	20
CONCLUSION	22

TABLE OF AUTHORITIES

PAGE

Cases:

Anna L. Tarr, Administratrix v. *Manchester Insurance Corporation*, 544 F.2d 14 (1st Cir. 1976) 18, 19

Christianson v. *Colt Industries Corp.*, 486 U.S. 800, 100 L. Ed. 2d 811, 108 S. Ct. 2166 (1988) 13, 14, 15

Demarest v. *Manspeaker*, 498 U.S. 184, 112 L. Ed. 2d 608, 111 S. Ct. 599 (1991) 20

EEOC v. *FLRA*, 476 U.S. 19, 90 L. Ed. 2d 19, 106 S. Ct. 1678 (1986) 20

Erie Railroad Co. v. *Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 814 (1938) 9, 17

Hill v. *BASF Wyandotte Corp.*, 696 F.2d 287 (4th Cir. 1982) 15

Leddy v. *Standard Drywall, Inc.*, 875 F.2d 383 (2d Cir. 1989) 12, 13

National Education Association, Inc. v. *Lee County Board of Public Instruction*, 467 F.2d 447 (5th Cir. 1972) 17

Patrick v. *Burget*, 486 U.S. 94, 100 L. Ed. 2d 83, 108 S. Ct. 1658 (1988) 20

Southeast Bank v. *Carmazzi*, 910 F.2d 115 (4th Cir. 1990) 5

United States v. *Desert Gold Mining Co.*, 433 F.2d 713 (9th Cir. 1970) 13

Statutes:

Fed. R. Civ. P. 54(b) 13

Rule of Decision Statute, 28 U.S.C. § 1652 ..... 9, 19

R. U.S. S. Ct., Rule 10 22

W. Va. Code § 31-1-17 (1974) 1

W. Va. Code § 51-1A-1 (1976) 2, 16

W. Va. R. App. P., Rule 24 19

Other Authorities:

1B Moore's Federal Practice ¶ 0.404 [4.-2] (1991) 13, 14

1B Moore's Federal Practice, ¶ 0.404 [4.-6] (1991) 15

17A Wright, *et al.*, Federal Practice and Procedure § 4248 (1988) 17

No. 94-869

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

JOSEPH M. PERSINGER, - - - - - - *Petitioner,*

versus

R. FRANK CARMAZZI,
SALES ONE, INC.,
SALES TWO, INC.,
JOHN C. MORTON,
W. GUY WILES, JR.,
WILLIAM A. TANTLINGER, Esq.,
PERSINGERS INCORPORATED,
WILLIAM F. AGEE and
BANK ONE, HUNTINGTON, WEST VIRGINIA, N.A. (Formerly, The First Huntington National Bank, N.A.) - - - *Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATUTES INVOLVED

In addition to that statutory provision referenced in the Petition for Certiorari, the Respondents state that the following statutory provisions are involved in this case.

1. W. Va. Code §31-1-17 (1974):

The initial bylaws of a corporation shall be adopted by its board of directors. The power to alter, amend or repeal the bylaws or adopt new bylaws, subject to

repeal or change by action of the shareholders or members, shall be vested in the board of directors unless reserved to the shareholders or members by the articles of incorporation. The bylaws may contain any provisions for the regulation and management of the affairs of the corporation not inconsistent with law or the articles of incorporation.

2. W. Va. Code §51-1A-1 (1976):

The supreme court of appeals of West Virginia may answer questions of law certified to it by the Supreme Court of the United States, a court of appeals of the United States, a United States district court or the highest appellate court or the intermediate appellate court for any other state, when requested by the certifying court if there are involved in any proceeding before it questions of law of this State which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court of appeals of this State.

STATEMENT OF CASE

This case evolves around and is totally consumed by the attempt of a combination of minority shareholders to gain control of Persingers Incorporated (PI), a West Virginia corporation, while avoiding significant financial commitment. These minority shareholders, self-named as the "Meredith Persinger Group," held approximately 16% of the PI outstanding stock.

The genesis of this action was an annual shareholders meeting on March 2, 1985 at which the minority group patriarch, Meredith Persinger, was removed and defendant R. Frank Carmazzi (Carmazzi) was installed as president and CEO of PI. Instrumental in the change was controlling shareholder John A. Persinger, son of PI's founder and nephew of Meredith Persinger, who held ap-

proximately 48% of PI's stock. Shortly after the meeting, John A. Persinger died and defendant Bank One, Huntington, West Virginia (Bank One) (formerly The First Huntington National Bank)[1] was named executor of his estate.

As executor, Bank One controlled the 48% interest in PI. Meredith Persinger and his son, Thomas Persinger, attempted to block Bank One's election of a representative on the Board of Directors by refusing to attend directors meetings and by seeking a court order preventing the holding of a special shareholders meeting. After the requested order was denied, a special meeting of shareholders was called and William F. Agee (Agee), a Senior Vice-President and Trust Officer of Bank One was installed as a director of PI.

Thereafter, Meredith Persinger, on seven different occasions between June 1985 and January 1987, and on his own initiative, offered to purchase the stock of PI held by Bank One. Each offer was received but rejected after consultation with Bank One's Trust and Investment Committee. In turn, each offer was countered following consultation with Bank One's Trust and Investment Committee. The ultimate response of Bank One was to offer to sell the shares to Meredith Persinger for $275 a share. Meredith Persinger rejected this offer.

At this juncture, defendants Carmazzi, W. Guy Wiles, Jr. (Wiles), and John C. Morton (Morton) made an unsolicited offer to Bank One to purchase the shares for $275 a share which resulted in the parties entering into a letter of intent. Then Wiles and Morton decided that they did not want to participate and Carmazzi, individually, decided to purchase the stock at the price rejected by Meredith

---

[1]Banc One Corporation, an Ohio corporation, is the parent corporation of Bank One.

Persinger. Upon completion of the sale to Carmazzi, Agee, the Bank's representative, resigned from the PI Board on April 27, 1987.

PI was then merged into Sales Two, Inc.[2], a company controlled by Carmazzi, and all minority shareholders, including Meredith Persinger and the Petitioner, were cashed out as shareholders of PI.

Prior to the merger of PI and Sales Two and before the sale of stock to Carmazzi, the bylaws of PI were amended repealing a bylaw provision which placed restrictions upon, but did not prohibit, the purchase of stock by officers and directors of PI. The notice of the annual shareholders meeting sent to all shareholders, as is proper under the West Virginia Corporation Act, did not state that repeal of this bylaw provision would be taken up at this shareholders meeting. Also prior to the sale and the merger, the Board of Directors approved the purchase of 872 shares of stock held by eight shareholders, upon the request of those shareholders without solicitation by any officer or director of PI for such purchases.

Having refused to pay the cost of acquiring the stock, the Meredith Persinger Group then began its attempts to achieve by indirection what it was unwilling to do directly. Petitioner and others filed this action on May 11, 1987 against Respondents (except Agee and Bank One).

Although Petitioner, as part of the requested relief, sought a temporary restraining order, the request was denied and on May 29, 1987 the holders of 69% of the PI

---

[2]Respondents Sales One, Inc., Sales Two, Inc. and Persingers Incorporated are related companies. There are no other related companies, whether designated as parent companies or subsidiaries. R. U.S. S. Ct. 29.1.

stock approved the merger of PI with Sales Two. All minority shareholders, including Petitioner, were cashed out.

Following various evidentiary hearings on Petitioner's request for a preliminary and permanent injunction, Petitioner on February 10, 1988 sought leave to amend his complaint to bring Bank One and Agee in as defendants. The district court on April 12, 1988 granted the motion and, for the first time, established a time-frame for discovery, dispositive motions *and trial.* Petitioner's amended complaint sought the same relief as in the original complaint, but now the defendants included Bank One and Agee.

Thereafter, the proceedings became enmeshed in hearings on preliminary motions and discovery. Petitioner sought an extension of the time for discovery in order to properly prepare for trial and ultimately the time-frame which had set a November 14, 1988 trial date was completely abandoned.

With discovery still in progress and Respondent's summary judgment motions pending, and without the matter being submitted for decision, the district court, by order of December 29, 1989, in a surprise decision, ordered that repeal of the bylaw by the shareholders and all subsequent acts of the officers and directors relative to the cash-out merger "be rescinded and held for naught" (Recission Ruling). Respondents appealed that ruling to the Fourth Circuit. That Court in a *per curiam* decision rendered August 3, 1990 concluded that the district court's order of rescission was not a final order and remanded the case for further proceedings. No opinion was expressed as to the merits (Appeal I). *Southeast Bank* v. *Carmazzi*, 910 F.2d 115 (4th Cir. 1990).

Thereafter, by order of August 30, 1990 the district court instructed the parties to submit proposed plans for implementation of rescission. Over their objections, Re-

spondents complied. No decision was rendered and by order of January 29, 1991 the district court referred the matter to a special master in broad terms: "to consider all issues involving the merger between Persingers Incorporated and Sales One, Inc. and Sales Two, Inc." Petitioner vehemently objected, argued that reopening the prior ruling was improper, sought to have the referral vacated, and requested transfer to another judge.

On January 23, 1991 the case was transferred from Senior Judge Dennis R. Knapp to Chief Judge Charles H. Haden, II. Thereafter, Judge Haden vacated the Rescission Ruling as premature, but expressed no opinion on the merits, and entered a time-frame order (the Vacating Order). Discovery proceeded and dispositive motions along with a pretrial order were filed by all parties. By order of June 22, 1992, Judge Haden granted Respondents' motions for summary judgment as molded (allowing Petitioner to pursue remedies of statutory valuation) and denied Petitioner's motion. An appeal by Petitioner to the Fourth Circuit followed (Appeal II).

In Appeal II Petitioner attacked as improper all aspects of the district court's order except for the court's rulings that (1) Petitioner had abandoned his causes of action for fraud, conspiracy and conversion; (2) there was no evidence to support such claims; and (3) Petitioner's 10(b)(5) claim was without merit.

Appeal II was fully briefed before the Fourth Circuit, and during oral arguments, the court expressed its view that the issues of state law being raised appeared to be appropriate for certification to the West Virginia Supreme Court. The parties were directed to confer for the purpose of drafting a set of proposed facts and certified questions. Petitioner and Respondents each submitted proposed orders, neither of which were adopted by the Fourth Circuit.

By order of June 18, 1993, the Fourth Circuit entered its order of certification. (Appendix to Petition, hereinafter referred to as "App.", p. 86). Following Petitioner's motion seeking revision of the statement of facts, an amended order of certification was entered on August 16, 1993. (App. p. 55).

Again, the issues were fully briefed and oral arguments were presented before the West Virginia Supreme Court. On February 17, 1994, the State Supreme Court ruled upon the certified questions. (App. p. 10). The Court found: "...no showing that the minority shareholders were treated unfairly, that the defendants acted improperly with regard to the minority shareholders or that the defendants gained any particular advantage as a result of an improper use of their fiduciary position." (App. p. 50). The West Virginia Supreme Court having confirmed the correctness of the district court's judgment, the Fourth Circuit affirmed the ruling below in a *per curiam* opinion. (App. p. 7).

MISSTATEMENTS OF FACT AND LAW BY PETITIONER

The material facts are those which have been set forth in the opinions of each of the courts to consider this matter (Rescission Ruling — App. pp. 285-322; Summary Judgment Opinion of Judge Haden — App. pp. 117-135; Fourth Circuit Order of Certification — App. pp. 86-116). Those facts, as Petitioner acknowledges are not in dispute. Respondents do not, however, accept the characterizations or conclusions drawn by Petitioner in his recitation of facts.

For the guidance of the Court, Respondents would point out:

(1) Petitioner states (Petition for Writ of Certiorari, hereinafter "Petition," p. 1) that he requests relief on behalf of himself and all other shareholders of PI. This, however, is untrue. Petitioner's request

for class certification was denied by the district court in its Order of April 12, 1988 (App. p. 336). The Order denying class certification has never been appealed.

(2) The bylaw provision which Petitioner claims Respondents violated (Petition p. 27-28) was validly repealed prior to Carmazzi's purchase of Bank One's block of stock and that bylaw provision did not prohibit the purchase of stock, but only placed restrictions on such purchases. (See App. pp. 291-294.)

(3) Respondent, Agee, never admitted as Petitioner argues that he knew of a plan involving "(i) the repeal of the bylaw and (ii) the selective redemption of certain Persingers, Inc. shareholders." (Petition p. 25)

(4) The Rescission Ruling was based entirely upon West Virginia Law, no federal statute or rule was found to have been violated. Any allegations that a conflict exists in decisions of Court of Appeals is wholly erroneous (Petition p. 59). The matter before, and the rulings of, the district court were based entirely on West Virginia law, the decisions in all cases cited by Petitioner are based upon the substantive law of other jurisdictions.

(5) The Respondents, collectively, prior to the redemptions, owned and controlled more than 50% of the stock of PI.

(6) Prior notice of a bylaw repeal need not be given in advance of an *annual* shareholders meeting.

(7) Those shareholders whose stock were allegedly selectively redeemed specifically requested redemption. No officer or director of PI solicited offers for redemption.

SUMMARY OF ARGUMENT

Through his Petition for Certiorari, Persinger would have this Court do two things: (1) by a tortured analysis

of due process, require the reinstatement of a district court judgment which reached erroneous conclusions about West Virginia law; and (2) act as an independent reviewing authority reversing the West Virginia Supreme Court's determinations as to West Virginia law. What Petitioner seeks is contrary to law, logic and established principles of judicial economy and authority.

Insofar as Petitioner's due process argument in concerned, it was within the power of the district court to vacate the interlocutory Rescission Ruling. Furthermore, Petitioner was given an opportunity, of which he availed himself, to fully and completely present his view of the case. Ultimately, that view was rejected by the district court, the West Virginia Supreme Court and the Fourth Circuit. There was no denial of due process.

Petitioner's other argument, that this Court should instruct the West Virginia Supreme Court upon West Virginia law is also without merit. Determinations by the highest court of a state upon that state's laws are conclusive. Rule of Decision Statute, 28 U.S.C. §1652; *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 814 (1938).

Finally, Petitioner rests much of his argument upon his assertion that the Fourth Circuit inappropriately certified questions of West Virginia law to the West Virginia Supreme Court. This Court may decline to consider this assertion since it is being raised here for the first time.

ARGUMENT

I. THE FINDINGS OF FACT ENUMERATED BY JUDGE KNAPP IN HIS RESCISSION RULING AND THE FINDINGS OF FACT CERTIFIED TO THE WEST VIRGINIA SUPREME COURT OF APPEALS ARE IDENTICAL IN ALL MATERIAL RESPECTS.

The Petitioner argues that "the facts proven by Petitioner at the 1987 trial upon which the trial judge based his rescission order precluded entry of summary judgment for Respondents in 1992." (Petition p. 53). Petitioner, however, fails to point out to this honorable Court that *all* facts set forth by Judge Knapp in his Rescission Ruling were also set forth, in almost identical language, in the Certified Questions to West Virginia Supreme Court of Appeals. The West Virginia Supreme Court of Appeals applied West Virginia law to those facts and determined that the Respondents breached no duty owed to Petitioner and violated no law protecting the rights of Petitioner. It is disingenuous for Petitioner to argue that Judge Knapp's application of West Virginia law is more accurate than West Virginia's highest court's application of West Virginia law.

If this Court were to reinstate the Rescission Ruling, as the Petitioner requests, all concepts of justice, common sense and judicial economy would be violated. The Rescission Ruling requires the institution of a plan of rescission and after institution of the plan, an appeal to the Fourth Circuit would follow. The appellate court, in turn, would be forced to reverse the Rescission Ruling based upon the now published opinion to the West Virginia Supreme Court of Appeals.

No court should ever lose sight of common sense and neither should this Court, the highest court of the United States. The Petitioner's Petition for Writ of Certiorari is frivolous and should only be viewed as such.

II. PETITIONER WAS NOT DENIED DUE PROCESS.

Petitioner contends that he was denied notice and an opportunity to be heard before Judge Haden entered his order vacating the interlocutory Rescission Ruling. On this basis, Petitioner argues he was denied due process. What Petitioner neglected to mention in his brief, however, is:

(1) that when Judge Knapp referred the entire matter to a special master Petitioner argued, at length, the reasons why the Rescission Ruling should not be, in effect, vacated,

(2) the Rescission Ruling was interlocutory and as such the district court retained the right to amend, modify or vacate said ruling and,

(3) based upon the West Virginia Supreme Court's Rulings to Certified Questions, Judge Knapp's conclusions of law set forth in the Rescission Ruling were clearly erroneous, and any due process denial was harmless error.

Petitioner had considerable opportunity to be heard and was not denied due process.

A. The Reopening of the Rescission Ruling Was Prompted by Judge Knapp.

The possible reopening of the Rescission Ruling was first considered by Judge Knapp, the alleged trial judge, in his referral of the matter to a special master *after* the case was sent back to the lower court by the Fourth Circuit. In referring the case to the master, Judge Knapp "authorized and directed [the special master] to consider all issues involving the merger between Persinger's Incorporated and Sales One, Inc., and Sales Two, Inc., and to report to the Court his findings of fact and conclusions of law with regard thereto". (App. p. 21) Petitioner and Respondents both understood this language to, in effect, reopen issues of liability which were determined by the Rescission Ruling. That Petitioner so understood the order is reflected in his motion to vacate it, in which he complained that the referral gave the special master sufficient power *"as to direct the master to reopen the record, to take additional evidence and virtually re-try the case."* In his motion and in two memoranda, Petitioner vehemently opposed the referral on the ground that it constituted a de facto vacation

of the Rescission Ruling. It is in this posture, with Petitioner's motion to vacate the referral to a special master pending, that the case was transferred to Judge Haden. Petitioner's contention that he was denied an opportunity to address reasons why the Rescission Ruling should not be vacated is, to say the least, disingenuous.

However, that did not end Petitioner's presentations to the district court. Petitioner followed up with arguments set forth in a motion to reconsider and in two memoranda. Having carefully considered Petitioner's position, Judge Haden denied the motion to reconsider.

In vacating the Rescission Ruling, Judge Haden simply returned the players to the field, allowing each to address the merits of the action. This was done by cross-motions for summary judgment and briefs after completion of new discovery. Upon this complete record, Judge Haden entered summary judgment for Respondents. Petitioner cannot and does not contend that there was any lack of notice or opportunity to be heard on the merits. In this regard, this case is quite similar to *Leddy* v. *Standard Drywall, Inc.*, 875 F.2d 383 (2d Cir. 1989).

Leddy involved a claim for additional employee benefit fund contributions under ERISA. Partial summary judgment was granted to the employer for claims based upon *res judicata*. However, when the case proceeded to bench trial, the court allowed testimony on the barred claims, and included those amounts in judgment for the claimant. The court's opinion made no reference to the employer's *res judicata* argument nor to the grant of partial summary judgment. The employer contended that it had been denied notice and an opportunity to be heard because it did not learn that the scope of consideration was to be broadened and the earlier order ignored until after judgment was entered. While the Second Circuit concluded the trial court had erred, in light of the employer's acknowledgment that

it had no other evidence to present, that error was harmless and did not require reversal.

Unlike *Leddy*, the Petitioner here was heard before the vacating order was entered. Like *Leddy*, the Petitioner here had a full opportunity to address the merits. If there was error, which respondents believe there was not, that error was harmless.

B. The District Court Retained Power Over the Rescission Ruling.

The Fourth Circuit concluded, as grounds for its *per curiam* dismissal and remand of Appeal I, that the Rescission Ruling was not a final judgment and, therefore, was not subject to appellate review. (App. p. 260) As an interlocutory order, the Rescission Ruling was subject to revision at any time. Fed. R. Civ. P. 54(b). That is so whether the interlocutory order is revisited by the same, or another judge. *Christianson* v. *Colt Industries Corp.*, 486 U.S. 800, 100 L. Ed. 2d 811, 108 S. Ct. 2166 (1988); *United States* v. *Desert Gold Mining Co.*, 433 F.2d 713, 715 (9th Cir. 1970) ("The judgment therefore remained subject to reconsideration and revision either by the same judge, a successor judge or a different judge to whom the case might be assigned.").

An interlocutory order does not acquire any greater finality merely by the fact that the case has been transferred to another judge. As was observed by Professors Moore, Lucas and Currier:

> The pre-transfer rulings constitute the law of the case and should not be lightly disturbed. They should not be treated as a special breed, however; transfer should no more freeze prior rulings than it should require their routine reexamination.[5]
>
> [5] . . . the beneficiary of such rulings should acquire no special advantage from the fortuitous event that the case was transferred from one judge to another.

> Nor generally should a judge who has been relieved of the burden of a case believe in the eternal verity of every interlocutory ruling he has made. And finally, it is wholly destructive of the process if the appellate court is called upon to compel by mandamus what it will later be called upon to reverse for error.

1B Moore's Federal Practice ¶ 0.404 [4.-2], pp. 127-129 (1991).

Thus, there was no prohibition upon Judge Haden in revisiting Judge Knapp's interlocutory ruling. Instead, the doctrine of the law of the case counsels a court to be reluctant to do so in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice. *Christianson* v. *Colt Industries Corp.*, *supra*, 486 U.S. at 817. The circumstances existing in this case amply warranted the action taken by Judge Haden. In issuing the Vacating Order, Judge Haden did not express an opinion as to the conclusions reached by Judge Knapp. He simply stated that the Rescission Ruling was premature. By reaching that decision, Judge Haden avoided manifest injustice in keeping with the standard set forth in *Christianson*. His exercise of judicial discretion was proper under the circumstances. In retrospect, given the state of the law as now announced by the West Virginia Supreme Court in answer to certified questions, Judge Haden's order was correct and Judge Knapp's was clearly erroneous. To reinstate Judge Knapp's opinion would be manifestly unjust and violative of *Christianson* since Judge Knapp's Conclusions of Law, based entirely on West Virginia law, were wholly rejected by the highest state court in West Virginia.

C. Any Allegations of a Denial of Procedural Due Process Should Not Be Used to Avoid the Clear Pronunciations of West Virginia's Highest Court.

While Respondents strongly contend Judge Haden's order vacating the Rescission Ruling was proper, even if it

were not, the Fourth Circuit properly certified issues of West Virginia Law to the West Virginia Supreme Court of Appeals and based upon the answers to the Certified Questions affirmed the district court's grant of summary judgment to the Respondents. A district court's adherence to the law of the case does not insulate an issue from appellate review nor bind the appellate court. *Christianson* v. *Colt Industries Corp., supra,* 486 U.S. at 817.

As was so cogently stated by the authors of Moore's Federal Practice:

> . . . the failure of the district court to follow its own decisions as the law of the case can almost never constitute reversible error. If its first decision was correct, and its second decision did not follow the first, and was incorrect, of course it might form the basis for reversal, but since it constitutes error on the merits, it is usually irrelevant that it constituted a departure from the law of the case. *If the second ruling was correct, and the first was incorrect, the court of appeals would not reverse on the ground that the district court should have adhered to its earlier erroneous decision, since both decisions are now before the court of appeals on the merits.* Similarly, if the first decision was correct and it was later followed as the law of the case, affirmance rests on its correctness, not on the doctrine of the law of the case. In sum, the doctrine of the law of the case in no way protects an erroneous judgment from reversal on appeal. (Emphasis supplied)

1B Moore's Federal Practice, ¶ 0.404 [4.-6], p. 140 (1991). *See also Hill* v. *BASF Wyandotte Corp.*, 696 F.2d 287, 290 fn. 3 (4th Cir. 1982) (Where the Court stated: "...we have not held that the 'law of the case' doctrine is so related to the very power of the second judge that we must in review affirm even a legally erroneous ruling because it was compelled as 'law of the case.'")

Therefore, as seen above, the Petitioner has not been denied due process, or if due process was denied, such denial was harmless.

II. THE ANSWERS OF THE WEST VIRGINIA SUPREME COURT OF APPEALS TO THE CERTIFIED QUESTIONS WERE BINDING ON THE FOURTH CIRCUIT.

Four questions were certified to the West Virginia Supreme Court by the Fourth Circuit pursuant to W. Va. Code §51-1A-1, *et seq.* (App. p. 55). Inasmuch as the answer to questions 1 and 2 was "no", questions 3 and 4 were not required to be addressed. The questions answered were:

1. Did West Virginia law require advance notice that a vote to repeal Bylaw §5.4 would be considered at the annual shareholders meeting held on March 9, 1987?
2. Do the facts state a claim under West Virginia law that the defendants or any of them breached any fiduciary duties they owed to PI's minority shareholders?

In answering Question 1 in the negative, the West Virginia Court in its opinion, (App. p. 36), concluded that:

> Thus, a bylaw like section 5.4 may be proposed, amended or repealed by act of the shareholders at an annual meeting without advance notice.

Then, in answering Question 2, after an extensive analysis of the facts as related to corporate fiduciary duties, that Court found no breach of any fiduciary duty. Petitioner, obviously displeased with these answers, asserts that West Virginia's highest court reached an incorrect result by committing numerous legal errors. (Petition pp. 54-57). He asks this Court to act as an independent reviewing authority to determine the law of West Virginia, even though the West Virginia Supreme Court has, in responding to the Certification Order, delineated the law of that state. In other

words, since the state court did not announce the law to Petitioner's satisfaction, Petitioner now wants to appeal to this Court for review. This Court should not make its own ruling regarding West Virginia law.

17A Charles A. Wright, et al., Federal Practice and Procedure, *Certification to State Court*, §4248, p. 179 (1988) points out that,

> *Certification would be a pointless exercise unless the state court's answers are regarded as an authoritative and binding statement of state law.* Thus the Fifth Circuit's early suggestion that answers to certified questions are 'merely advisory and entitled, like *dicta*, to be given persuasive but not binding effect as a precedent,' has long since been forgotten and it is now accepted that the state answers are binding. (Emphasis added.)

National Education Association, Inc. v. *Lee County Board of Public Instruction*, 467 F.2d 447 (5th Cir. 1972), reflects the same thought as that of the Wright treatise. Plaintiffs there argued, as does the Petitioner in this case, that the Florida Supreme Court had misapplied the principles of Florida law to the facts of the case. The Fifth Circuit held that the determination made by the Florida court on certification "must necessarily be conclusive. *Erie Railroad Co.* v. *Tompkins*, 1938, 304 U.S. 64, 58 S. Ct. 814, 82 L.Ed. 1188." *Id.* at 450. In footnote 6 on page 450 the Court further explained,

> The gist of the teachers' argument is that the Supreme Court of Florida has misapplied the principles of Florida law to the facts of this case by formulating its decision in terms of a legal theory which those facts do not support. The obvious answer is that a Federal court does not second guess a State's application of its own law. *Nelms* v. *State Farm Mutual Automobile Ins. Co.*, (5 Cir. 1972), 463 F.2d 1190 [1972].

In *Anna L. Tarr, Administratrix* v. *Manchester Insurance Corporation*, 544 F.2d 14 (1st Cir. 1976), the New Hampshire Supreme Court, on certification from a United States district court, answered certain questions adversely to plaintiff and plaintiff sought an order correcting the New Hampshire court's interpretation of its own state statute, or alternatively, to recertify the question. The district court refused to grant the relief and plaintiff appealed to the First Circuit.

Apparently, the circumstances underlying the certification involved the answering of two questions concerning the New Hampshire workmen's compensation statute. The New Hampshire Supreme Court, in answering the two questions, also answered a third question whose answer was largely dispositive of the action against the plaintiff/appellant. Plaintiff/appellant's counsel discovered this circumstance after the expiration of the ten-day period allowed for filing a petition for rehearing in the state court. Instead of moving the New Hampshire court to accept a petition for "rehearing late," appellant chose to proceed in the federal district court which denied the relief requested.

The First Circuit, on appeal, was asked to correct the New Hampshire court's interpretation of its statute, or, alternatively, to recertify. The First Circuit's handling of appellant's request for relief is of considerable significance here:

> Clearly, we cannot do the former [correct the state court interpretation]. No matter what the result, we cannot 'correct' a state court's interpretation of its own law. *Mullaney* v. *Wilbur*, 1975, 421 U.S. 684, 690-91, 95 S. Ct. 1881, 44 L.Ed.2d 508.
>
> We think it would be equally inappropriate to usurp the state court's control of its docket. If appellant had sought of that court permission to file a petition for rehearing late and permission had been denied, it can-

> not be thought that we should overrule that decision by again presenting it with the question. We see no substantial difference between overruling a state court's discretion, and adopting a procedure which would have the effect of depriving the court of the opportunity of exercising one. The issue, however, lies deeper than courtesy. *The purpose of certification is to ascertain what the state law is, not, when the state court has already said what it is, to afford a party an opportunity to persuade the court to say something else. The rule of Erie R.R.* v. *Tompkins, 1938, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188, calls on us to apply state law, not, if we can be persuaded to doubt its soundness, to participate in an effort to change it.*
>
> (Brackets and emphasis added.)

544 F.2d at 15.

Similarly, the Rule of Decision Statute, 28 U.S.C. §1652 requires that a federal court accept as controlling the final decision of state courts. 28 U.S.C. §1652 provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

Here, the highest state court in West Virginia has spoken. The Petitioner cannot now be afforded the opportunity to persuade this Court or any federal court to say something else. Federal courts cannot "correct" a state court's interpretation of its own law, nor do federal courts second guess a state's application of its own law. The determination of the West Virginia court was conclusive.

If Petitioner felt that the West Virginia Supreme Court misapplied or misinterpreted West Virginia law and overlooked material facts, he should have filed a Petition for Rehearing as required by Rule 24 of the West Virginia Rules of Appellate Procedure.

III. ISSUES WHICH PETITIONER HAS RAISED FOR THE FIRST TIME IN HIS PETITION SHOULD NOT BE GIVEN CONSIDERATION BY THIS COURT.

As a routine matter of defining the efficient administration of an integrated system of trial and appellate courts, this Court has long declined to consider questions presented in a petition for certiorari that have not been considered by the lower court. *Patrick* v. *Burget*, 486 U.S. 94, 100 L. Ed. 2d 83, 108 S. Ct. 1658 (1988); *Demarest* v. *Manspeaker*, 498 U.S. 184, 112 L. Ed. 2d 608, 111 S. Ct. 599 (1991); *EEOC* v. *FLRA*, 476 U.S. 19, 90 L. Ed. 2d 19, 106 S. Ct. 1678 (1986). In keeping with this principle, certain issues raised by Petitioner in his brief bear no further consideration.

A. Petitioner Failed to Assert Before the Circuit Court Below That It Was Improper for It to Certify Issues to the West Virginia Supreme Court of Appeals.

In his brief, Petitioner asserts that it was improper for the Fourth Circuit to certify to the West Virginia Supreme Court the issues of state law which ultimately resolved this case. As his basis for this assertion, Petitioner contends that the applicable state law was clear and that certification was unnecessary. (Petition pp. 59-62). This Court need give no further consideration to this issue because it is being raised here for the first time.

The matter of certification to the West Virginia Supreme Court was raised by the Fourth Circuit panel during oral arguments. Petitioner expressed no opposition. After the Order of Certification (including a statement of all relevant facts and questions of law to be answered) was certified to the state court, Petitioner filed a petition for rehearing. In that petition, Petitioner sought only an

amendment of the factual statements. He did not challenge the propriety of certification.[3]

Additionally, in the briefing submitted to the West Virginia Supreme Court upon the certified questions, Petitioner did not challenge the propriety of that Court's consideration. After the certified questions were answered adversely to Petitioner, he filed with the Fourth Circuit a Motion for Relief Notwithstanding the Opinion of the West Virginia Supreme Court of Appeals. Although challenging the content and thoroughness of the State Supreme Court opinion, he did not contend it lacked the authority to rule upon the issues certified. That motion was followed by the filing in the Fourth Circuit of Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc. In that request, Petitioner contended that the "answers to this Court's certified questions given by the West Virginia Supreme Court were wrong because that Court simply ignored the linchpin material fact of the January 9, 1987 agreement." (Pet., 12 July 1994, at p. 7). Again, Petitioner did not challenge the Fourth Circuit's authority to certify questions to the State Supreme Court in this case, or the state court's power to answer them. He simply disagreed with the manner in which the state court answered the questions.

---

[3]See Appellants' Petition for Rehearing and Suggestion for Rehearing En Banc, 1 July 1993, p. 3:

> At the oral argument on this appeal, the court suggested that it might be appropriate to certify the legal issue underlying Plaintiffs' claims to the Supreme Court and sought counsel's views on that course of action. While plaintiffs' counsel had no objection to that procedure in the abstract, he did raise some concern as to how the Supreme Court would be provided with the facts on which to base its decision. The court responded that it would determine the facts with the assistance of counsel.

As review of the proceedings before the Fourth Circuit and West Virginia Supreme Court clearly shows, Petitioner upon numerous occasions sought to avoid the implementation of the rulings made by the West Virginia Supreme Court. Yet, at no time prior to the filing of his Petition for Certiorari, did he assert as an issue the matter now set forth in his Question 1(a) and (b), — the authority of the Fourth Circuit to certify these questions and the power of the West Virginia Supreme Court to answer them. Under these circumstances, this Court need give no further consideration to this matter.

CONCLUSION

There is no substantive federal question which warrants this Court's attention. There is no issue which meets the parameters set forth in U.S. Supreme Court Rule 10. Respondents respectfully request that the Petition for Certification be refused.

Respectfully submitted,

Of Counsel for R. FRANK CARMAZZI, SALES ONE, INC., SALES TWO, INC., JOHN C. MORTON, W. GUY WILES, WILLIAM A. TANTLINGER, PERSINGERS INCORPORATED AND WILLIAM F. AGEE

Of Counsel for Bank One, Huntington, West Virginia, N.A.